IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 50603

FILED

DEC 14 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 two counts of lewdness with a child under 14 years of age. Seventh Judicial District Court, Lincoln County; Steve L. Dobrescu, Judge.

This case arises from an incident in which appellant Cody Thiede touched the breasts of the victim, J.J. On appeal, Thiede raises the following arguments: (1) the prosecutor committed numerous acts of misconduct; (2) the district court erred in admitting J.J.'s reference to a prior bad act; (3) the district court erred when it allowed the investigating officer, Maribah Cowley, to bolster J.J.'s testimony through prior consistent statements and when it allowed Cowley to vouch for J.J.'s veracity; and (4) cumulative error warrants reversal.

We conclude that: (1) the prosecutor did not commit misconduct warranting reversal of the judgment of conviction; (2) the district court did not err in admitting J.J.'s reference to a prior bad act; (3) the district court did not commit reversible error by admitting Deputy Cowley's testimony regarding J.J.'s prior consistent statements and her testimony vouching for J.J.'s veracity; and (4) cumulative error does not warrant reversal. Therefore, we affirm the district court's judgment of

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

DISCUSSION

I. The prosecutor did not commit misconduct warranting reversal of the judgment of conviction

Thiede argues that the prosecutor committed numerous acts of misconduct, which warrant reversal. We disagree.

"A prosecutor's comments should be viewed in context, and 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'" Knight v. State, 116 Nev. 140, 144-45, 993 P.2d 67, 71 (2000) (quoting United States v. Young, 470 U.S. 1, 11 (1985)). This court applies a two-step analysis to allegations of prosecutorial misconduct: (1) we first determine whether the prosecutor's conduct was improper, and (2) if so, whether it warrants reversal or was harmless error. Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 476 (2008).

However, the defendant must object to the misconduct during trial in order to preserve a claim of prosecutorial misconduct for appeal. Id. at ___, 196 P.3d at 477. This affords the district court with the opportunity to rule upon the objection, reprimand the prosecutor, and give instructions to the jury. Id. If a defendant does not preserve an issue for appeal, then this court applies a plain-error analysis. Id. "Under that standard, an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Id. (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

A. The prosecutor did engage in improper vouching but this did not constitute plain error

Thiede argues that the prosecutor committed reversible misconduct by vouching for J.J.'s veracity and inflaming the jury's passions in his closing argument. We disagree.

"The prosecution may not vouch for the credibility of a witness either by placing the prestige of the government behind the witness or by indicating that information not presented to the jury supports the witness's testimony." Evans v. State, 117 Nev. 609, 630, 28 P.3d 498, 513 (2001). It is also improper for a prosecutor to inflame a jury's passions. Shannon v. State, 105 Nev. 782, 789, 783 P.2d 942, 946 (1989).

During closing argument, the prosecutor stated:

> [J.J.] is the only eye witness . . . And our laws, in this state, protect children. And if we are not going to listen to the children, if we are not going to listen and take action on what they say, we might as well get rid of the laws, because it becomes fair game.

The defense did not object to the prosecutor's statements. Because the defense did not preserve this issue for appeal, this court applies plain-error review. Valdez, 124 Nev. at ___, 196 P.3d at 477-78.

We conclude that the prosecutor's statements constitute improper vouching as they suggest the jury must protect children by accepting J.J.'s testimony as truthful. However, we also conclude that the prosecutor's statements alone were insufficient to amount to reversible plain error. See id. Under Valdez, the defense must show the error caused actual prejudice or a miscarriage of justice. Id. at ___, 196 P.3d at 477. Such a showing was not made in this case. Also, the prosecutor's statement about listening to child victims was relevant to the facts because J.J. was a minor.

B. The prosecutor did not invite the jury to put themselves in J.J.'s parents' place

Thiede argues the prosecutor committed misconduct when he allegedly asked the jury to put themselves in J.J.'s parents' place. We disagree.

If, during closing argument, a prosecutor asserts his own personal opinion, urges the jury to convict a defendant on a basis other than the evidence, or appeals to the jury's sympathies, then the prosecutor has committed misconduct. Pantano v. State, 122 Nev. 782, 793, 138 P.3d 477, 484 (2006).

Here, the prosecutor made the following statement during his closing argument:

> Mr. Thiede took [J.J.], [to] the park, Rose Park, the Super Park and down by the Credit Union hugging and kissing and he's got his hands where they shouldn't be. Or we don't teach our children that that's what you do. And we respect our children, want to raise them well.

(Emphases added). Thiede argues that by using the phrase "our children," the prosecutor was trying to put the jury in the position of J.J.'s parents.

The prosecutor's statement, however, addressed why Nevada has laws against lewdly touching a child. The context of the prosecutor's statement addressed children's lack of maturity, the State's role in protecting children, and parents' roles in raising children to not act in a lewd manner. Thus, the prosecutor's statement was not misconduct.

C. The prosecutor did not argue facts not in evidence

Thiede argues that the prosecutor argued facts not in evidence during his closing argument. We disagree.

"A prosecutor may not argue facts or inferences not supported by the evidence," but he may "argue inferences from the evidence and offer

conclusions on contested issues." Miller v. State, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005) (internal quotations and footnote omitted).

Thiede argues that in the following statement, the prosecutor referred to facts not in evidence:

> [J.J.] was not happy being [here]; you could tell that. And she was committed enough to—to tell you that yes, she had a relationship with Mr. Thiede. She liked it. Of course, the attention of a 21 year old man with appropriate monies and whatever on a 12, 13 year old girl well that—that happens. Things get bought, things—things get done.

In a later statement, the prosecutor stated that Thiede admitted to touching J.J.'s breast on top of her clothes. The defense objected and argued that Thiede did not make this admission. Thiede argues that there was no evidence that Thiede bought J.J. things or that he admitted to the touching.

We conclude that the prosecutor's statement about Thiede's influence over J.J. was not improper because he was arguing that, based on J.J.'s testimony about her relationship with Thiede, it is likely that Thiede's status as an older male made an impression on the teenage J.J. In addition, the prosecutor based his statement about Thiede's confession on Deputy Cowley's testimony, and therefore, the prosecutor was arguing that her testimony inferred that Thiede admitted to the improper touching. Thus, neither statement was improper.

II. The district court did not err in admitting J.J.'s reference to Thiede's attempt to reach into her blouse

Thiede argues that the district court erred when it allowed the State to introduce prior bad act evidence. We disagree.

A district court determination about whether prior bad act evidence is admissible "is a decision within its discretionary authority and is to be given great deference." Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002). This court will not reverse such a decision by the district court absent manifest error. Id.

Under Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997), prior bad act evidence is admissible if the district court determines, "outside the presence of the jury, that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." Generally, prior acts are inadmissible if they are remote in time and involve acts different from the charged conduct. Braunstein, 118 Nev. at 73, 40 P.3d at 417.

During J.J.'s testimony, the State asked her if Thiede had previously tried to reach into her blouse and she answered "Yes." It is unclear whether this act was remote in time or whether the referenced attempt was part of the charged instances. However, this act does involve an incident relevant to the crime charged. As a result, we conclude the district court did not commit manifest error by admitting such evidence. Also, Thiede did not object to the introduction of this evidence at trial and declined to cross-examine J.J. about the statement. Therefore, if the admission of this evidence was improper, a plain-error analysis would be appropriate. Valdez, 124 Nev. at ___, 196 P.3d at 477-78. Under a plain-error analysis, the defense must show the error caused actual prejudice or a miscarriage of justice. Id. at ___, 196 P.3d at 477. We conclude that such a showing was not made in this case.

III. The district court did not commit reversible error by admitting Deputy Cowley's testimony about J.J.'s prior consistent statements and her testimony vouching for J.J.'s veracity

A. Prior consistent statements

Thiede argues that the district court committed reversible error when it allowed Deputy Cowley to testify about J.J.'s prior consistent statements. We disagree. Because the defense did not preserve this issue for appeal, this court applies a plain-error analysis. Id. at ___, 196 P.3d at 477-78.

Under NRS 51.035(2)(b), a prior consistent statement is not hearsay if the declarant testifies at trial, he or 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." This means a prior consistent statement is only admissible if made when the declarant had no motive to fabricate. Gibbons v. State, 97 Nev. 299, 301, 629 P.2d 1196, 1197 (1981).

In Gibbons, this court found prejudicial error because a sexual assault victim's prior consistent statements were admitted at trial even though they were made when the victim had a motive to fabricate. Id. at 302, 629 P.2d at 1197. The State's case in Gibbons rested entirely on the victim's credibility, and Gibbons could neither confirm nor deny his involvement in the crime because he was so intoxicated at the time it allegedly occurred. Id.

In Patterson v. State, the defendant was convicted of lewdness with a child under the age of 14 years. 111 Nev. 1525, 1527, 907 P.2d 984, 985 (1995). The Patterson 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. Also, the court concluded, "Given the State's failure on appeal to present any persuasive argument supporting the propriety of admitting the prior consistent statements, we conclude that the investigator's statements constituted plain error on the record." Id. However, this court then concluded that the error was harmless because there was more than minimal independent evidence of guilt, including a partial admission. Id. at 1533-34, 907 P.2d at 989-90. Regarding the partial admission, the defendant admitted there was a possibility he could have acted improperly because he blacks out when drinking. Id. at 1534, 907 P.2d at 990. Therefore, this court affirmed the judgment of conviction. Id.

In this case, Thiede argues that J.J. lied about the alleged incident because he had entered into a relationship with another female. Thiede further argues that at the time of Deputy Cowley's interviews with J.J., she had a motive to fabricate. Therefore, Deputy Cowley's testimony could not have served the purpose of rebutting an implication of recent fabrication. Rather, the purpose of Deputy Cowley's testimony regarding the interviews was to bolster J.J.'s testimony. Also, the State did not show that J.J. made the statement before a motive to fabricate arose.

We conclude that the district court erred by allowing Deputy Cowley to testify about J.J.'s prior consistent statements. Further, this court must apply a plain-error analysis because the defense did not preserve this issue for appeal. Valdez, 124 Nev. at ___, 196 P.3d at 477-78. Under this plain-error analysis, the defense must show that the error caused actual prejudice or a miscarriage of justice. Id. at ___, 196 P.3d at 477. We conclude that such a showing was not made in this case. Also, unlike Patterson, the State presented a persuasive argument supporting

the propriety of admitting J.J.'s prior consistent statements. Specifically, the State explained that J.J.'s prior consistent statements suggest she maintained affection for Thiede and lied about their relationship in order to protect him. Thus, J.J.'s prior consistent statements provide probative evidence to rebut Thiede's theory that J.J. lied to get revenge.

Further, this case is distinguishable from Gibbons because it did not rest entirely on the victim's credibility. In addition to J.J.'s testimony, there is also a statement made by Thiede to Deputy Cowley which may constitute a partial admission. Specifically, Deputy Cowley asked Thiede during an interview whether he touched J.J. on her breasts inside her clothing. Thiede responded that he did not touch J.J. in this manner. Then Deputy Cowley gestured to her own breasts and asked Thiede whether he touched J.J. on the outside her clothing. In response, Thiede stated that he did touch J.J. on the outside of her clothing.

B. Vouching

Thiede argues that the district court committed reversible error by allowing Deputy Cowley to improperly vouch for J.J.'s veracity. We disagree. Because Thiede did not object to this testimony at trial, we review the district court's admission of this evidence for plain error. Valdez, 124 Nev. at ___, 196 P.3d at 477-78.

"An expert may not comment on the veracity of a witness." Lickey v. State, 108 Nev. 191, 196, 827 P.2d 824, 827 (1992). In Felix v. State, the State asked an expert witness what the witness's opinion was regarding whether the victim's statements were the product of fantasy. 109 Nev. 151, 167, 849 P.2d 220, 232 (1993), superseded by rule on other grounds as stated in Evans v. State, 117 Nev. 609, 624-25, 28 P.3d 498, 509-10 (2001). The defense objected, but the district court allowed the witness to answer. Id. The expert witness testified that the victim's

"statements were not the product of fantasy 'because she is more concrete and a forthright-type person.'" Id. On appeal, this court held that the district court erred in allowing the testimony because it went to the veracity of the victim's testimony and her credibility. Id. at 203, 849 P.2d at 255.

In this case, the State asked Deputy Cowley whether she formed an opinion as to why J.J. originally denied that Thiede touched her inappropriately. Deputy Cowley said that she believed J.J. was fond of Thiede and did not want to get him in trouble.

Like Felix, the district court erred in admitting Deputy Cowley's statements at trial because they went to the veracity of J.J.'s testimony. Deputy Cowley testified that J.J. originally did not tell the truth because she liked Thiede and wanted to protect him. This testimony implied that J.J. did tell the truth when she stated that Thiede had committed a crime.

However, unlike Felix, the defense in this case failed to object to the disputed testimony. As a result, a plain-error analysis is appropriate. Valdez, 124 Nev. at ___, 196 P.3d at 477-78. Under this analysis, the defense must show that the error caused actual prejudice or a miscarriage of justice. Id. at ___, 196 P.3d at 477. We conclude that such a showing was not made in this case. Further, the State used this testimony to rebut Thiede's theory of fabrication by explaining inconsistencies in J.J.'s three interviews. In addition, NRS 50.345 allows expert testimony in a sexual assault prosecution that "the victim's behavior or mental or physical condition is consistent with the behavior or condition of a victim of sexual assault."

IV. Cumulative error does not warrant reversal of the judgment

Finally, Thiede argues that cumulative error in his trial warrants reversal. We disagree.

Even when errors are harmless, their cumulative effect may violate a defendant's constitutional right to a fair trial. Valdez, 124 Nev. at ___, 196 P.3d at 481. When determining whether cumulative error exists, this court considers "'(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.'" Id. (quoting Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000)).

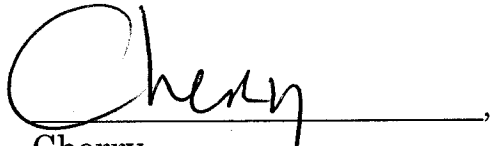
In Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985), this court determined that cumulative error warranted reversal for three reasons. First, the State charged the appellant with a serious felony. Id. Second, the evidence against the appellant was not overwhelming. Id. Third, the nature of the errors was to deny the appellant the right to a fair trial. Id. These errors included the district court's admission of a statement in violation of appellant's Miranda rights, and the district court's failure to grant a new trial after the bailiff and a juror engaged in misconduct. Id. at 2, 692 P.2d at 1289.

We conclude that cumulative error does not warrant reversal in this case. Here, the district court improperly admitted statements by the prosecutor which constituted vouching, improperly allowed Deputy Cowley to testify about J.J.'s prior consistent statements, and improperly admitted Deputy Cowley's statements which went to the veracity of J.J.'s testimony. However, the character of these errors suggests that the defendant's right to a fair trial was not violated. Unlike Big Pond, the errors in this case taken together are not particularly egregious. Although the district court improperly admitted statements by the prosecutor which

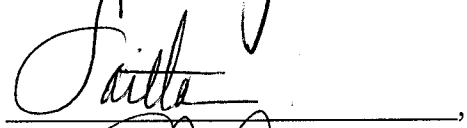
constituted vouching, the defense did not object and such statements were relevant to the facts. Although the district court improperly allowed Deputy Cowley to testify about J.J.'s prior consistent statements, the defense did not object to this line of questioning either. Finally, although the district court improperly admitted Deputy Cowley's statements going to the veracity of J.J.'s testimony, the defense did not object and the State used this testimony to rebut Thiede's theory of fabrication.

Therefore, we conclude that cumulative error does not warrant reversal. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry



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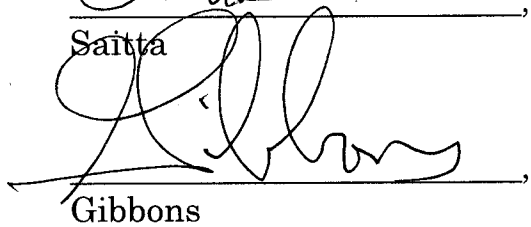

_____, J.
Gibbons

cc: Hon. Steve L. Dobrescu, District Judge
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