IN THE SUPREME COURT OF THE STATE OF NEVADA

JOAQUIN ERNESTO HERNANDEZ-AYALA A/K/A JOAQUIN ERNES HERNANDEZ-AYALA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50720

FILED

AUG 05 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 one count of sexual assault of a minor under fourteen years of age and one count of lewdness with a minor under fourteen years of age. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. The district court sentenced appellant Joaquin Ernesto Hernandez-Ayala to a prison term of twenty years to life for sexual assault and a concurrent term of ten years to life for lewdness.

On appeal, Hernandez-Ayala contends that (1) the district court erred in admitting his statement to the police because it was coerced; (2) the district court abused its discretion in allowing multiple witnesses to testify to hearsay statements made by the child victim in violation of the Confrontation Clause, which effectively bolstered the testimony of the child victim; and (3) the district court abused its discretion by allowing testimony regarding statements made by the victim to another non-testifying witness.

Voluntariness of appellant's statement

First, Hernandez-Ayala contends that the district court erred in admitting his statement to the police because his statement was coerced.

Due process requires that any confession admitted at trial be voluntary. Passama v. State, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987). That is, a confession cannot be admitted into evidence unless "it is made freely and voluntarily, without compulsion or inducement." Id. A voluntary confession is the "product of a 'rational intellect and a free will.'" Id. at 213-14, 735 P.2d at 322-23. (quoting Blackburn v. Alabama, 361 U.S. 199, 208 (1960)). A confession is involuntary if "coerced by physical intimidation or psychological pressure." Id. (citing Townsend v. Sain, 372 U.S. 293, 307 (1963), overruled on other grounds by Keeney v. Tamayo-Reyes, 504 U.S. 1, 5 (1992)). A district court's decision regarding the voluntariness of a defendant's confession "will not be disturbed on appeal if it is supported by substantial evidence." Allan v. State, 118 Nev. 19, 23-24, 38 P.3d 175, 178 (2002), overruled on other grounds by Rosky v. State, 121 Nev. 184, 190-91, 111 P.3d 690, 694 (2005). "Substantial evidence is that which a reasonable mind might consider adequate to support a conclusion." Steese v. State, 114 Nev. 479, 488, 960 P.2d 321, 327 (1998).

Hernandez-Ayala contends that the district court erred in admitting his statements because he made allegations below that police officers put a gun to his head and beat him prior to his statement. The district court found that his statement was not coerced because the videotape of Hernandez-Ayala's statement showed that he was relaxed, he never complained of mistreatment, officers brought him hot tea because he

said that he was cold, and the video and his booking photo showed no evidence of a beating.

We conclude that the district court did not err in admitting the statement because there was no evidence presented demonstrating that the statement was coerced. Hernandez-Ayala directs us to no evidence demonstrating coercion and appears to argue that the district court should not have admitted the statement purely on the basis that he made an allegation of coercion. Rather, the district court's finding is supported by substantial evidence.

The child victim's hearsay statements

Hernandez-Ayala contends that the district court erred in admitting hearsay statements that the victim made to her mother, her aunt, and a detective, for two reasons: (1) these statements violated the Confrontation Clause and (2) the statements effectively bolstered the victim's testimony.

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). Under Crawford v. Washington, 541 U.S. 36 (2004), "when the declarant is unavailable, reliability assessments of testimonial hearsay cannot survive scrutiny under the Confrontation Clause without actual confrontation." Pantano v. State, 122 Nev. 782, 789, 138 P.3d 477, 481 (2006).

We conclude that because the victim testified and Hernandez-Ayala was offered the opportunity to cross-examine her, there is no

Confrontation Clause violation.[1] Pantano, 122 Nev. at 790, 138 P.3d at 482. We further conclude that, as discussed below, the hearsay statements were properly admitted and, particularly given the young age of the child,[2] were not so cumulative as to amount to vouching for the victim's testimony or unduly prejudicing the case. See Felix v. State 109 Nev. 151, 200, 849 P.2d 220, 253 (1993). The evidence strongly supported the verdict—particularly, Hernandez-Ayala's inculpatory statement to the police, which was consistent with the victim's statement.

Statements to family members

Child victim hearsay statements are admissible if the statements meet the requirements of NRS 51.385 and the United States Constitution. Felix, 109 Nev. at 200, 849 P.2d at 253. NRS 51.385(1) allows the admission of the child's hearsay statement regarding sexual conduct if the child is under the age of ten and: "(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."

In this case, the district court held a hearing regarding the testimony of the mother and aunt, found that the statements made by the child victim were spontaneous, and that any questioning conducted by the mother and aunt of the child was limited and within the scope of proper parental or familial concern. NRS 51.385(2). Thus, the district court

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[1]Hernandez-Ayala chose not to cross-examine the victim at trial.

[2]The victim was six years old and starting kindergarten.

correctly applied NRS 51.385 in determining the reliability of the child victim's statements.

Statement to police officers

Hearsay is a statement offered to prove the truth of the matter asserted unless the "declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is: (a) [i]nconsistent with [her] testimony." NRS 51.035(2).

In the present case, (1) the victim testified to one act of sexual assault and testified that she did not remember talking to a police officer; (2) Detective Shannon Tooley testified that the victim had made a statement to her during investigation that Hernandez-Ayala had touched her on her "private areas a lot," including her buttocks, demonstrating that the statement was inconsistent with the victim's testimony; and (3) the victim was subject to cross-examination, although defense counsel chose not to exercise that right. Thus, the statement was properly admitted as an inconsistent statement of the child declarant.

Hearsay statement of non-testifying witness

Hernandez-Ayala contends that the district court erred in allowing a witness to testify regarding statements the victim made to a non-testifying adult.

We note that Hernandez-Ayala did not object to the testimony during trial, thus we review for plain error. See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); NRS 178.602.

During trial, the victim's aunt, Blanca Saragoza, testified that she was giving the victim and her brother a bath, and when she began washing the victim's private area, she said it hurt. When Saragoza inquired why, the victim told her that Hernandez-Ayala had digitally

penetrated her. Sarazoga exited the bathroom and told some family members what the victim had said. Sarazoga's older sister, Anna Blacencia, went into the bathroom and the victim repeated what she had told Sarazoga. Blacencia did not testify at trial.

It is not apparent from the record that the statement was sought to prove the matter asserted—that Hernandez-Ayala sexually assaulted the victim—but rather to show how the statement affected Sarazoga and the actions she took thereafter. However, even if the testimony was inadmissible hearsay, Hernandez-Ayala did not demonstrate plain error. The testimony was nonspecific and evidence of Hernandez-Ayala's guilt was substantial in that the victim testified that Hernandez-Ayala had digitally penetrated her and Hernandez-Ayala admitted to the conduct in his statement to the police.

Accordingly, having considered Hernandez-Ayala's contentions and determined they are without merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
Christopher R. Oram
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk