IN THE SUPREME COURT OF THE STATE OF NEVADA

ASHTON CACHO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51647

FILED

MAY 27 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of open or gross lewdness, one count of indecent exposure, and four counts of lewdness with a child under the age of 14 years. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

The district court sentenced appellant Ashton Cacho to one year in prison for the open or gross lewdness and indecent exposure counts and to life in prison with the possibility of parole after 10 years for lewdness with a child under the age of 14 years. The convictions were based upon Cacho's inappropriate behavior and touching of his girlfriend's daughter, C.M. On appeal, Cacho assigns the following eight errors that he asserts warrant reversal: (1) his convictions are redundant, (2) the district court abused its discretion by allowing third parties to testify regarding hearsay statements attributed to C.M., (3) the State withheld Brady evidence, (4) the district court abused its discretion when it admitted evidence that was more prejudicial than probative, (5) the State did not present sufficient evidence to support his conviction, (6) the district court erred when it prevented defense counsel from analogizing reasonable doubt during closing argument, (7) the State engaged in

prosecutorial misconduct, and (8) jury instructions lowered the State's burden of proof.[1]

We conclude that the convictions for open or gross lewdness and indecent exposure cannot both stand, as conceded by the State, because they are based on the same conduct. We further conclude that Cacho's remaining arguments are without merit. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Redundancy

Open or gross lewdness and indecent exposure

Cacho asserts that his convictions for Count 1, open or gross lewdness, and Count 2, indecent exposure, are redundant. The State concedes that Counts 1 and 2 were pleaded in the alternative and convictions on both counts cannot stand. We agree. Counts 1 and 2 were based on the same conduct and evidence and, therefore, both cannot stand.

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[1]Cacho also argues that the district court erred in failing to hold a hearing regarding the child victim's competency before allowing her to testify. Cacho did not request voir dire of C.M. nor did he object to her competency; therefore, he did not preserve the issue for appeal and we need not consider it. See Mejia v. State, 122 Nev. 487, 492, 134 P.3d 722, 725 (2006) (in instances when a defendant neither objects before or at trial to the child's competency, nor requests a voir dire examination of the child and, therefore, fails to preserve the issue properly for appeal, this court need not consider the issue). We note, nevertheless, that our review of the record reveals that C.M. was a competent witness because she testified coherently, demonstrated an ability to tell the difference between truth and falsehood, did not show signs of coaching, and communicated with ease. See Evans v. State, 117 Nev. 609, 624, 28 P.3d 498, 509 (2001) (explaining that a child is competent to testify if his or her testimony is clear, relevant, and coherent).

See Braunstein v. State, 118 Nev. 68, 79, 40 P.3d 413, 421 (2002). We therefore vacate the indecent exposure conviction.

Lewdness with a child under the age of 14

Cacho also argues that his convictions for four counts of lewdness with a child under the age of 14 are redundant and therefore violate double jeopardy. We disagree.

This court reviews legal questions de novo. Thompson v. State, 125 Nev. ___, ___, 221 P.3d 708, 711 (2009). "The Double Jeopardy Clause of the United States Constitution protects defendants from multiple punishments for the same offense." Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003). This court uses the test enunciated in Blockburger v. United States, 284 U.S. 299 (1932), to determine the constitutionality of multiple convictions for the same act. Salazar, 119 Nev. at 227, 70 P.3d at 751. "'Under this test, "if the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses."'" Id. (quoting Williams v. State, 118 Nev. 536, 548, 50 P.3d 1116, 1124 (2002) (quoting Barton v. State, 117 Nev. 686, 692, 30 P.3d 1103, 1107 (2001))). If the offenses at issue are indeed separate, the State may bring multiple charges based upon a single incident, so long as the convictions are not redundant. Id. "'[W]here a defendant is convicted of two offenses that, as charged, punish the exact same illegal act, the convictions are redundant.'" Id. at 228, 70 P.3d at 751 (quoting State of Nevada v. Dist. Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000)).

We determine that the evidence presented at trial established that Cacho had touched C.M. inappropriately four times. Count 3 of the amended information alleged that Cacho committed the offense by means

of touching and/or tickling the chest, stomach, and privates of C.M. It was based on the testimony of Brada L., C.M.'s mother and Cacho's girlfriend. Brada testified that sometime in April or May 2007, C.M. told her that Cacho had pretended to tickle her and had run his hands down her chest and into her pajamas, touching her vagina. Counts 4 through 6 allege that Cacho committed the offense by touching and/or fondling the genital area of C.M. The counts are based on the following: C.M.'s testimony that on June 20, 2007, she awoke to find Cacho running his hands down her chest and stomach and into her underwear, touching her vagina. Additionally, in a statement to police, C.M. told Detective Thomas Mason that Cacho had touched her three times. Her mother corroborated the story, testifying that C.M. told her that Cacho ran his hands down her chest and stomach and touched her vagina. Brada told detectives that she had been aware that Cacho had touched C.M. inappropriately on other occasions. Moreover, Melissa C., Brada's sister and C.M.'s aunt, testified that at some point at the end of April or the beginning of May 2007, she overheard a conversation between C.M. and Brada during which C.M. stated that Cacho had touched her on one or two separate occasions. Accordingly, we conclude that sufficient evidence was presented at trial to convict Cacho of four counts of lewdness with a child under the age of 14 years.[2]

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[2]We note that Cacho also argues that lack of specificity of the amended information did not give him proper notice of the charges against him, and therefore, violated his due process rights. In making this argument, Cacho concedes that he did not object to the information. When a defendant fails to make any objection to the amended information, this court uses a reduced standard of review because the principle of waiver attaches. See Simpson v. District Court, 88 Nev. 654, 661, 503 P.2d 1225,

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Hearsay

Cacho next assigns error to the district court's decision to admit hearsay testimony attributed to C.M. and Brada without first holding a hearing pursuant to NRS 51.385. He also takes issue with the testimony of other family members and Detective Mason. Cacho argues that because there was no pretrial hearing regarding the trustworthiness of each individual, the admission of the hearsay statements from each witness violated his confrontation rights.

As a threshold matter, we note that Cacho misstates pertinent facts. The district court held voir dire to determine Brada's trustworthiness pursuant to NRS 51.383. Accordingly, the district court acted within its discretion in allowing Brada to testify because it determined that she was trustworthy. Moreover, at another pretrial hearing, the State announced that it would call witnesses, with the intention of offering statements made by C.M. to those witnesses, pursuant to NRS 51.385. The defense stated that it would not object to Detective Mason's testimony with regard to statements that C.M. made to him. Concomitantly, at trial the defense did not object to Detective

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. . . continued

1230 (1972); Wood v. State, 76 Nev. 312, 316, 353 P.2d 270, 272 (1960). We conclude that pursuant to this court's long-standing jurisprudence, the amended information was sufficient to put Cacho on notice and to allow him to prepare an adequate defense. See State v. Hughes, 31 Nev. 270, 272-73, 102 P. 562, 562 (1909) (explaining that once the principle of waiver attaches, an information or indictment will be sufficient "unless it is so defective that by no construction, within the reasonable limits of the language used, can it be said to charge the offense for which the defendant was convicted").

Mason's testimony, nor that of C.M.'s grandmother and brother and, therefore, waived the issues on appeal. See Dermody v. City of Reno, 113 Nev. 207, 211, 931 P.2d 1354, 1357 (1997).

We further observe that Cacho's argument regarding inadmissible hearsay testimony is convoluted. He appears to make a blanket assertion that the district court was required to hold a hearing for each and every witness, although at a pretrial hearing he stipulated to simply laying the foundation for each witness outside the presence of the jury. Additionally, the crux of Cacho's argument appears to be with Melissa's testimony regarding the conversation she heard between C.M. and Brada. Accordingly, we limit the discussion to those statements. As the State proffered those statements under three alternate theories, NRS 51.385, prior consistent statements, and prior inconsistent statements, we address the argument pursuant to each hearsay rule.

NRS 51.385

This court reviews a district court's hearsay rulings for an abuse of discretion. Fields v. State, 125 Nev. ___, ___, 220 P.3d 709, 716 (2009). NRS 51.385 sets forth the hearsay exception for statements by a child victim of sexual or physical abuse. This court has stated that the Confrontation Clause does not bar testimony about the child-victim's statements to third parties, pursuant to NRS 51.385, so long as the declarant is present at trial and testifies. Gaxiola v. State, 121 Nev. 638, 646, 119 P.3d 1225, 1231 (2005). As to the statute's hearing requirement, this court has held that failure to conduct a trustworthiness hearing pursuant to NRS 51.385(1)(a) does not warrant automatic reversal but, rather, is subject to a harmless error analysis. Braunstein v. State, 118 Nev. 68, 77, 40 P.3d 413, 420 (2002). In considering whether an error was harmless, this court takes into consideration the defendant's inability to

conduct a cross-examination and whether he was prejudiced. See id. at 77-78, 40 P.3d at 420.

In the present case, C.M. testified at trial and was subject to cross-examination. Cacho extensively cross-examined the child. Cacho fails to show any prejudice which resulted from C.M.'s testimony, as it was actually helpful to the defense because it showed the jury that C.M. could not remember some conversations about Cacho's inappropriate behavior. Accordingly, any statements attributed to C.M. were admissible pursuant to NRS 51.385, and the district court's failure to hold a trustworthiness hearing was harmless error.

Prior consistent/inconsistent statements

Pursuant to NRS 51.035(2)(a) a declarant's prior inconsistent testimony is not hearsay. Additionally, NRS 51.035(2)(b) states that a statement which is "[c]onsistent with [a] declarant's testimony and offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive" is not hearsay.

Cacho objected to Melissa's testimony which included statements Brada made during a phone call. Those statements included the following information: that Brada did not know about any inappropriate touching up until that conversation and that she found out about Cacho touching C.M. during that conversation. Those statements that Melissa attributed to Brada were wholly inconsistent with the statements Brada made during her testimony at trial. Brada testified that C.M. told her about Cacho touching her when they were alone and that by the end of April 2007 she knew that Cacho had exposed himself to C.M. and touched her vagina at least once. Therefore, Melissa's testimony about Brada's statements was admissible because it consisted of prior inconsistent statements. Accordingly, the district court properly admitted

Melissa's testimony as to the phone call in question as a prior inconsistent statement. Additionally, any statements attributed to C.M. were admissible pursuant to NRS 51.385, even though the district court failed to hold trustworthiness hearings, because Cacho was not prejudiced by their admission and cross-examined each of the witnesses regarding C.M.'s hearsay statements.

Brady material

Cacho next argues that the State knowingly withheld exculpatory evidence until just days before the trial began. His argument focuses on Child Protective Service (CPS) records. This argument is meritless.

Brady v. Maryland, 373 U.S. 83 (1963) requires the state to disclose material evidence to the defense. Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). "[E]vidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed." Id. There are three factors to consider when examining a potential Brady violation: whether the evidence at issue (1) was favorable to the defendant; (2) was withheld, either inadvertently or intentionally; and (3) was material and, therefore, prejudice occurred. Id. at 67, 993 P.2d at 37. This court uses de novo review in determining whether the state has committed a Brady violation. Id. at 66, 993 P.2d at 36.

The district court held a calendar call on February 6, 2008. During the proceeding, the following exchange took place between the court, the State, and the defense:

> [DEFENSE COUNSEL]: . . . I had put in an order on this case with the Court. I'm assuming it's in your file. It's for the relief of CPS records from [the prosecutor]—

THE COURT: No, I didn't find it. It came in yesterday, I didn't sign it.

. . . .

[THE PROSECUTOR]: I have no objection. In fact, I told him to file. I have the CPS records.

The late disclosure of the CPS materials was due to Cacho's failure to request the records sooner. Indeed, from the exchange above, it appears that the State reminded the defense to ask for the CPS records. Further, at the conference call, Cacho did not object to the timing of the disclosure or move for a continuance. When the trial began on February 11, 2008, Cacho, again, did not move to continue or express any concerns regarding the CPS evidence. Rather, he used the CPS records, which revealed that C.M. had made inconsistent statements regarding the sexual abuse, including denying and recanting the allegations, to impeach C.M. Cacho's cross-examination of C.M. and the other State witnesses was in part based on the CPS records. Therefore, Cacho has failed to demonstrate how the late disclosure prejudiced him. Further, Cacho received the information at a later date because he did not ask for it until days before the trial. Accordingly, because Cacho has failed to demonstrate any intent by the State to withhold the evidence or any prejudice, we conclude that there was no Brady violation.

Prejudicial evidence

Cacho argues that the district court abused its discretion by allowing Brada to testify that she knew Cacho had a total of nine children with six other women. He additionally assigns error to Brada's testimony with regard to her father's conviction for sexual abuse.

We note that Cacho and the State argue the admissibility of the issue presented here pursuant to a prior bad act analysis. The evidence at issue is not prior bad acts because it did not relate to acts

which implicate a so-called prior bad act or collateral offenses for which Cacho could have been charged. See Salgado v. State, 114 Nev. 1039, 1042-43, 968 P.2d 324, 326-27 (1998) (explaining that cases in which the evidence does not implicate prior bad acts on the defendant's part or a collateral offense for which the defendant could have been charged, a Petrocelli hearing is not required; in contrast to cases where the previous act is a collateral offense or a prior bad act, which do require a Petrocelli hearing). Further, the district court did not admit it as such, but rather, admitted it as relevant rebuttal evidence. Accordingly, the inquiry before this court is whether the evidence at issue was more prejudicial than probative.

Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." NRS 48.035(1). This court will not disturb a district court's decision to admit evidence absent an abuse of discretion or manifest error. Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006).

In the present case, the district court overruled Cacho's objection to Brada's testimony that she was aware that Cacho had been with six other women and fathered nine children. It did so after a lengthy bench conference regarding the relevancy of the evidence. The district court found that the evidence was relevant because, in his opening statement, Cacho inferred that the entire case was some kind of conspiracy concocted by Brada. According to the defense, Brada was destitute without Cacho and was jealous and angry that he left her with a newborn. During cross-examination, Cacho repeatedly questioned Brada about her motives, inferring that the accusations against Cacho began as soon as the two ended their relationship.

We determine that by insinuating that this entire case was based upon Brada's false accusation, Cacho made Brada's motive and the couple's relationship relevant. The evidence goes to the quality of the relationship between Cacho and Brada and shows Brada's state of mind—that she always knew he had other children with former girlfriends. The evidence does not reflect, even remotely, upon whether or not Cacho was capable of sexually abusing an eight year old. Additionally, Cacho has failed to demonstrate how prejudice ensued from its admission.

Next, Cacho assigns error to the district court's decision to allow Brada to testify that her father was a convicted sex offender. Cacho fails to provide any evidence that the statement about Brada's father prejudiced him. Moreover, we determine that the testimony was relevant because it showed Brada's state of mind. Brada testified that her past experience with CPS had not been a positive one because her father had been convicted of sexual abuse, placed in prison, then released only to sexually abuse again. She testified that she did not trust the system and, therefore, she hesitated in reporting Cacho's actions when she first learned about the incidents. Given her past experiences, Brada's testimony was relevant because it explained why a mother would not report sexual abuse sooner than she did. Cacho has failed to demonstrate how he was prejudiced by the testimony. Accordingly, we conclude that the district court acted within its discretion in allowing Brada to testify about her father.

Sufficiency of the evidence

Cacho asserts that the State failed to prove the charges beyond a reasonable doubt. We disagree. Because we vacate the indecent exposure count and the one count of lewdness with a child under the age of 14, we focus on the sufficiency of the evidence as to the remaining counts.

In determining if a jury verdict was supported by sufficient evidence, this court inquires "'"whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."'" Rose v. State, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007) (quoting Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984))). This court has stated that it is the jury's function, not that of this court, to assess the weight and credibility of witnesses. Id. at 202-03, 163 P.3d at 414.

As to the open or gross lewdness conviction and one count of lewdness with a child under the age of 14, we determine that there was sufficient evidence to uphold the conviction. C.M. testified with particularity that Cacho exposed his penis to her in the old apartment when they all lived together. She was specific as to where she was, how he did it, and her reaction. She did not recant this allegation or make inconsistent statements regarding the exposure incident. Furthermore, her testimony regarding the June 20, 2007, touching was with particularity; she testified that she was asleep and awoke to find Cacho running his hand down her chest and into her pajama bottoms. She testified with particularity as to what day it happened and the time. C.M. repeatedly stated that when she woke up, Cacho asked for the remote control. We conclude that the foregoing evidence was sufficient for any rational trier of fact to find Cacho guilty of open or gross lewdness, in addition to one count of lewdness with a child under the age of 14.

Moreover, we conclude that the evidence at trial established that Cacho committed lewd acts upon C.M. as many as three times. While C.M. testified to only one touching, the testimony of the other State

witnesses established that C.M. had stated that Cacho had touched her two or three times. The various testimonies were consistent as to the timeline of events. Brada, Melissa, and C.M.'s grandmother all testified that near the end of April or the beginning of May 2007, C.M. made spontaneous statements to them that Cacho had touched her vagina and exposed himself. Melissa testified that C.M. stated that it had happened as many as two times by the beginning of May 2007. C.M. told Detective Mason that by mid-June 2007, it had occurred two or three times. The jury assessed the credibility of the witnesses and gave weight to the testimony establishing that Cacho touched C.M. three times, and it is not this court's function to replace its own judgment with that of the jury's. Accordingly, we hold that the State presented sufficient evidence to convict Cacho of one count of open or gross lewdness and three counts of lewdness with a child under the age of 14.

Reasonable doubt analogy

Cacho argues that the district court improperly stopped him from making an analogy regarding reasonable doubt during closing argument. Cacho's argument is without merit.

This court has consistently held that it is improper to "quantify, supplement, or clarify the statutorily prescribed standard for reasonable doubt." Evans v. State, 117 Nev. 609, 631, 28 P.3d 498, 514 (2001). It has additionally prohibited analogizing reasonable doubt to regular life decisions. See Holmes v. State, 114 Nev. 1357, 1365-66, 972 P.2d 337, 342 (1998).

During closing argument, Cacho attempted to make the following analogy with regard to a balloon and reasonable doubt:

> Now, I like to use an illustration when I talk about reasonable doubt in this case. And what I do is imagine that the State's case is like a

> balloon. And as they present evidence, testimony to you, it's like blowing air into that balloon, so it starts to take shape. . . .
>
> Now, if you have in your mind a reasonable doubt, we'll say it's like this knife here.

The State objected. The district court did not strike the comments, but rather, asked Cacho to move forward to the next argument.

We conclude that the district court properly stopped Cacho from moving forward with this analogy pursuant to this court's jurisprudence regarding the characterization of reasonable doubt. Cacho was not only drawing an analogy but also attempting to explain or clarify reasonable doubt—thus, going squarely against this court's decisions. E.g., Daniel v. State, 119 Nev. 498, 521, 78 P.3d 890, 905-06 (2003) (stating that this court has a long-standing adherence to the rule that reasonable doubt may not be explained). Accordingly, we determine that the district court acted properly when it stopped Cacho from moving forward with his analogy.

Prosecutorial misconduct

Cacho contends that during closing argument the State engaged in prosecutorial misconduct by vouching for witnesses and comparing Cacho to Brada's father—a convicted sex offender.[3]

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[3]Cacho further asserts that it was prosecutorial misconduct when the State, in its closing argument, discussed the exposure incident and stated, "Even [Cacho] acknowledged that accidentally admittedly he showed her his penis." The State did not misstate the evidence. Cacho admitted that he accidentally showed C.M. his penis. In fact, that admission was part of his transcribed statement to police, which was admitted as an exhibit at trial. Accordingly, the argument is meritless.

In reviewing assertions of prosecutorial misconduct, this court engages in the following two-step process:

> First, we must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, we must determine whether the improper conduct warrants reversal.
>
> With respect to the second step of this analysis, this court will not reverse a conviction based on prosecutorial misconduct if it was harmless error.

Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 476 (2008) (citations omitted).

Vouching for the credibility of witnesses

Cacho contends that the State vouched for the credibility of its witnesses three times. First, when the prosecutor said, "The truth is he really showed it." We note that the context in which the State spoke was in describing the exposure incident, where Cacho admitted to accidentally showing C.M. his penis. The State was making a comment, not vouching for C.M.'s credibility.

Next, Cacho assigns error to the State's comment, "That's truth . . . That's real," in describing the emotions Brada felt when she found out that Cacho had touched her daughter. The State was referring back to what Melissa testified to—listening to the exchange between Brada and C.M. over the phone. Melissa testified that it was then that Brada learned that Cacho had touched C.M. Melissa further testified that Brada was crying and very upset. In referring back to Melissa's description, the State was not vouching for Melissa's truthfulness; rather, the State was explaining that Brada's reaction was an authentic reaction to discovering that Cacho had touched her daughter.

Lastly, Cacho assigns error to the State's comment, "[C.M.] has to this day never recanted her allegations, in spite of still being in foster care." The State was stating a fact—not vouching for C.M.'s credibility as a witness. C.M. had made so many inconsistent statements, the State was simply pointing out that since the allegations were reported to the police and she had been placed in foster care, C.M. had not changed her story. The State was pointing out relevant evidence and not engaging in impermissible vouching.

Comparing Cacho to a convicted sex offender

In its closing statement, the State made the following comment: "[Brada] found a guy, just like the guy that married dear old mom." Cacho did not object. While we determine that it was improper for the State to compare Cacho to Brada's father, a convicted sex offender, because Cacho did not object and has failed to demonstrate that the comment resulted in actual prejudice or a miscarriage of justice, reversal is not warranted. See Valdez, 124 Nev. at ___, 196 P.3d at 477 (holding that when the defendant does not object to the misconduct at trial, this court applies a plain error review; therefore, unless the defendant can demonstrate that the error affected his substantial rights by causing actual prejudice or a miscarriage of justice, reversal is not warranted).

Jury instructions

Cacho argues that jury instruction number 6 lowered the State's burden of proof. We disagree.

This court reviews a district court's decision as to jury instructions for an abuse of discretion or judicial error. Grey v. State, 124 Nev. 110, 122, 178 P.3d 154, 163 (2008). Failure to object precludes appellate review absent plain error. See id. at 123, 178 P.3d at 163.

Cacho assigns error to jury instruction number 6, alleging it lowered the burden of proof. He takes issue with the fact that the instruction included the no-corroboration rule of law. Cacho concedes that Nevada law recognizes the rule in sexual assault cases but argues that lewdness is not a sexual assault.

This court has upheld jury instructions which attach the no-corroboration rule to "sexual offenses," including those offenses of sexual assault and lewdness. Gaxiola v. State, 121 Nev. 638, 647-48, 119 P.3d 1225, 1231-32 (2005). Cacho offers no legal authority, Nevada or otherwise, supporting his argument that committing lewdness with a minor under the age of 14 is somehow not a sexual offense. Accordingly, jury instruction number 6 was a correct statement of the law.[4]

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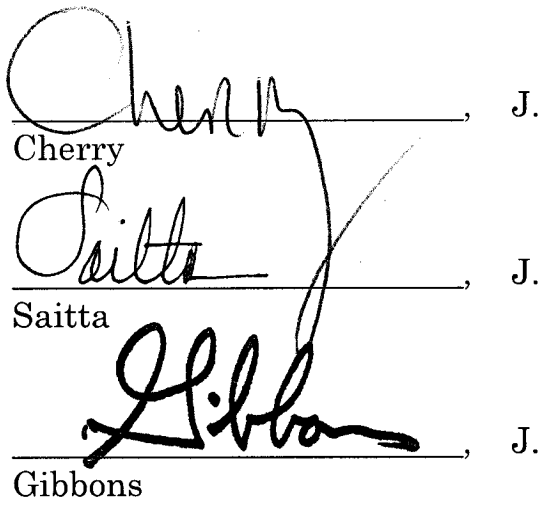
[4]Cacho also assigns error to jury instruction number 5, arguing that it lowered the burden of proof because it stated that the State was not required to prove a specific date as to the sexual offense. In Nevada, when time is not an essential element of the offense, the State is not required to allege or prove the specific date of the offense. See Cunningham v. State, 100 Nev. 396, 400, 683 P.2d 500, 502 (1984). Accordingly, jury instruction number 5 was a correct statement of the law.

Lastly, Cacho argues that jury instruction number 11 was improper because it lowered the State's burden of proof and diminished the presumption of innocence. He did not object to the instruction and, therefore, we review it for harmless error. See Grey, 124 Nev. at 123, 178 P.3d at 163. As this court has consistently upheld similar instructions which included the word "material," we conclude that jury instruction number 11 was a correct statement of law. See, e.g., Beets v. State, 107 Nev. 957, 963 & n.3, 821 P.2d 1044, 1048-49 & n.3 (1991) (noting that in upholding a jury verdict with the words "material element[s]," this court observed that it had previously upheld a similar jury instruction which also included these words).

In conclusion, we vacate the one count of indecent exposure and affirm the remaining convictions, determining that Cacho's remaining arguments are meritless, and remand to the district court, directing that it modify the judgment of conviction consistent with this holding. We therefore

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



_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Jennifer Togliatti, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk