IN THE SUPREME COURT OF THE STATE OF NEVADA

PHILLIP J. ARDOIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51708

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 third amended judgment of conviction, which the district court entered after considering a post-conviction petition for a writ of habeas corpus that was filed pursuant to the remedy provided in Lozada v. State, 110 Nev. 349, 359, 871 P.2d 944, 950 (1994). Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Procedural History

On June 11, 2003, the grand jury indicted appellant Phillip Ardoin of one count of using technology to lure children and three counts of use of a minor in producing pornography or as the subject of a sexual portrayal in a performance. Ardoin was subsequently arrested and taken into custody pursuant to a bench warrant.

On February 23, 2004, Ardoin filed a pretrial petition for a writ of habeas corpus in the district court. In his petition, Ardoin claimed that the district court lacked jurisdiction to proceed to trial on the three counts of use of a minor in producing pornography because the counts were based on acts that were committed in South Carolina. The State

responded to the petition. The district court heard argument, determined that it had jurisdiction, and denied Ardoin's petition.

On March 22, 2004, Ardoin's case proceeded to trial, where a jury found him guilty of the count of using technology to lure children and the three counts of use of a minor in producing pornography or as the subject of a sexual portrayal in a performance. Thereafter, the district court convicted and sentenced Ardoin, imposing a prison term of 4 to 10 years for the luring count and concurrent prison terms of 5 to 15 years for each of the three pornography counts. As to the pornography counts, the district court suspended execution of the sentence and placed Ardoin on probation for a fixed period of 30 days. The district court also imposed a special sentence of lifetime supervision.

On April 20, 2006, Ardoin filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed a response and a motion to dismiss. The district court found that Ardoin had been deprived of a direct appeal, appointed counsel to represent Ardoin, and established a briefing schedule for Ardoin's Lozada petition.

On January 2, 2008, Ardoin filed his Lozada petition in the district court. After the State filed its response and Ardoin filed his reply, the district court heard argument on the petition. The district court found that there was sufficient evidence to support the use of technology to lure children count, determined that the three counts of use of a minor in producing pornography or as the subject of a sexual portrayal in a performance should have been merged into a single count, and ordered the

State to prepare an amended judgment of conviction. This appeal followed.[1]

Prosecutorial Misconduct

Ardoin contends that the district court committed reversible error by failing to declare a mistrial sua sponte based upon prosecutorial misconduct. Ardoin claims that during closing argument the prosecutor improperly suggested to the jury that the victim was not 16 years old when she met him shortly before midnight on October 28, 2002, because she was not born until 1:30 p.m. on October 28, 1986. Ardoin argues that this improper comment may have influenced the jury's decision, as evidenced by a question posed by a juror after the verdict was recorded. However, Ardoin did not object to the prosecutor's comment.

"In order to preserve for appellate consideration allegations of misconduct in a closing argument, the accused must make a timely objection, obtain a ruling, and request an admonition of counsel and an appropriate instruction to the jury." Williams v. State, 103 Nev. 106, 110-11, 734 P.2d 700, 703 (1987). However, we have discretion to consider an error if it was "plain" and affected the appellant's "substantial rights." NRS 178.602. "An error is plain if the error is so unmistakable that it reveals itself by a casual inspection of the record." Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (internal quotation marks and citations omitted). "Normally, a defendant must show that an error was prejudicial in order to establish that it affected his substantial rights." Tavares v. State, 117 Nev. 725, 729, 30 P.3d 1128, 1131 (2001), modified

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[1]Because the Lozada remedy is the functional equivalent of a direct appeal, we review Ardoin's claims de novo.

on other grounds by Mclellan v. State, 124 Nev. ___, ___, 182 P.3d 106, 111 (2008).

We have reviewed the prosecutor's comment in context. We conclude that the comment does not constitute misconduct and did not deprive Ardoin of a fair trial. Accordingly, Ardoin has failed to demonstrate that the district court committed plain error by not declaring a mistrial sua sponte.

Sufficiency of the Evidence

Ardoin contends that the evidence adduced at trial to support his conviction for using technology to lure children was insufficient because NRS 201.560 indicates that the luring must be done with the intent to engage in sexual contact with the victim while she was still a child. Ardoin asserts that if this statute is meant to punish luring and not sexual conduct, then "it is unconstitutionally vague in its wording which provides there must be an 'intent to engage in sexual conduct with the child.'" And Ardoin argues that he did not violate the statute because the age of consent in both Nevada and South Carolina is 16 years of age; he never asked the victim to leave her home while she was 15 years old; he traveled to South Carolina two days before the victim's 16th birthday; and although he ran into the victim purely by chance on his second day in South Carolina, he was not alone with her until after she turned 16 years old.

We have previously stated that NRS 201.560 criminalizes "the use of technology to lure children away from their parents or guardians" and held that the statute is not unconstitutionally vague because it clearly defines the proscribed conduct and provides "persons of ordinary intelligence [with] fair notice of what conduct is forbidden." State v.

Colosimo, 122 Nev. 950, 953, 954, 142 P.3d 352, 354, 355 (2006). To obtain a category B felony conviction under this statute, the State must prove that the defendant used technology to lure a child away from her parents or legal guardian with "the intent to engage in sexual conduct with the child." 2001 Nev. Stat., ch. 560, § 4(3)(a), at 2787; see also Colosimo, 122 Nev. at 960-61, 142 P.3d at 359 (providing that the intended victim must be less than 16 years of age and have actual parents whose express consent was absent or avoided). "'As in any other case where the intent is material, the intent need not be proved by positive or direct evidence, but may be inferred from the conduct of the parties and the other facts and circumstances disclosed by the evidence.'" Mathis v. State, 82 Nev. 402, 406, 419 P.2d 775, 777 (1966) (quoting State v. Thompson, 31 Nev. 209, 217, 101 P. 557, 560 (1909)); see also NRS 193.200 ("Intention is manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused.").

Here, the jury heard testimony that Ardoin and the victim met in an Internet chat room, where 36-year-old Ardoin learned that the victim was 15 years old, female, and lived in South Carolina. They exchanged email addresses and began communicating by email and by telephone. Their relationship became romantic in nature. Ardoin sent the victim a ring, roses, a card with some money, and a teddy bear; they exchanged photographs over the Internet; and they obtained email addresses that proclaimed their love for each other. Ardoin also sent the victim a sexually explicit cartoon and the lyrics to a song that talked about sex. Ardoin told the victim that he wanted to keep their relationship a secret because he was afraid of her father. The victim did not tell her parents that she was communicating with Ardoin.

Ardoin and the victim discussed him visiting her on "the weekend before or after [her] birthday." In one of his emails to the victim, Ardoin stated, "I can't wait to see you, Hon, I'm going to be really sad if we can't spend at least one night together. I can't wait to sleep with my arms wrapped around you and be able to kiss you and tell you I love you." Ardoin met with the victim in South Carolina the day before her 16th birthday and they discussed her sneaking out of her house and meeting with him in his hotel room. At approximately 12:00 a.m. on her birthday, the victim snuck out of her house without her parent's knowledge, met Ardoin in his hotel room, and engaged in sexual intercourse.

The jury also heard testimony that two or three dozen unopened condoms were observed on the night stand in Ardoin's hotel room and the nearest place where condoms could be purchased was a town located 15 miles away. Additionally, Ardoin testified that he told the police "that the sex sort of happened" and he was not "trying to coordinate the sex with [the victim] turning 16." Ardoin acknowledged that he did not know what South Carolina's age of consent was when he met with the victim. And Ardoin admitted that he intended to have sex with the victim after she turned 16 years old.

From this testimony, we conclude that a rational juror could infer that Ardoin intended to engage in sexual conduct with the victim when he used technology to lure the victim away from her parents without their consent. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Jurisdiction

Ardoin contends that the State did not have jurisdiction to prosecute him for the offense of use of a minor in producing pornography or as the subject of a sexual portrayal in a performance because the photographs of the victim were taken while he was in South Carolina and they were not published or otherwise used in Nevada.

NRS 171.020 addresses the State's jurisdiction to prosecute a criminal defendant for a crime that was accomplished in another state. It provides,

> Whenever a person, with intent to commit a crime, does any act within this State in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this State, such person is punishable for such crime in this State in the same manner as if the same had been committed entirely within this State.

We have determined that "[t]he language of [this] statute gives jurisdiction to Nevada courts whenever the criminal intent is formed and any act is accomplished in this state in pursuance or partial pursuance of the intent." Shannon v. State, 105 Nev. 782, 792, 783 P.2d 942, 948 (1989). And we have held that the question of "whether NRS 171.020 allows Nevada jurisdiction over crimes occurring in another state . . . is a question of law to be decided by the court, not to be submitted to a jury." Id. at 791, 783 P.2d at 948.

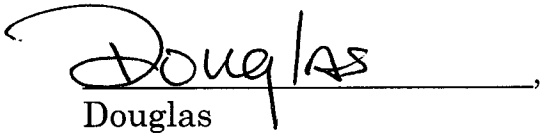
Here, the State presented evidence that Ardoin travelled to South Carolina to meet the victim for a sexual purpose, he brought along two digital cameras, and he used the cameras to take nude photographs of the victim after they had engaged in sexual intercourse. Given these facts, we conclude the jurisdictional requirements of NRS 171.020 were met and

the district court did not err by ruling that the State had jurisdiction over the offense of use of a minor in producing pornography or as the subject of a sexual portrayal in a performance.

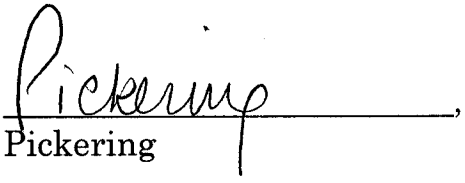
Having considered Ardoin's contentions and concluded that they are without merit, we

ORDER the amended judgment of conviction AFFIRMED.

_____, J.
Parraguirre



_____, J.
Douglas



_____, J.
Pickering

cc: Hon. Valerie Adair, District Judge
Amesbury & Schutt
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk