IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHNNY EDWARD MCMAHON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52071

FILED

OCT 16 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of three counts of sexual assault with a minor under sixteen years of age, three counts of statutory sexual seduction, and one count of open or gross lewdness. Eighth Judicial District Court, Clark County; David B. Barker, Judge. The district court sentenced Johnny Edward McMahon to a term of 20 years to life in prison for each sexual assault and 12 months for open and gross lewdness, all counts to run concurrently. The district court struck the three counts of statutory sexual seduction.

On appeal, McMahon contends that (1) there was insufficient evidence to support the jury's verdict, (2) the district court abused its discretion in allowing a nurse practitioner to testify as an expert witness, and (3) the joinder of offenses was improper.

Sufficiency of the evidence

Citing to State v. Purcell, 110 Nev. 1389, 887 P.2d 276 (1994), for support, McMahon contends that the evidence presented was insufficient to support the jury's verdict because the witnesses were not

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credible and had motives to fabricate and there was no corroborating scientific evidence.

Our standard of review in determining the sufficiency of the evidence is "'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)), cert. denied, ___ U.S. ___, 129 S. Ct. 95 (2008). When considering the sufficiency of the evidence in sexual assault cases, we have held that the victim's testimony alone is sufficient to uphold a conviction. LaPierre v. State, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992). Although the victim's testimony need not be corroborated, "the victim must testify with some particularity regarding the incident in order to uphold the charge." Id.

In Purcell, Purcell was convicted of lewdness and sexual assault. The victim was the State's only witness. 110 Nev. at 1391-92, 887 P.2d at 277. Defense counsel presented five witnesses who testified that the victim had a history of lying and had a motive to lie because she wanted to live with her father instead of her mother. Id. at 1392, 887 P.2d at 277-78. The district court granted a new trial, stating that the evidence of guilt was conflicting, the victim's testimony was inconsistent, and the victim had a motive to fabricate. Id.

Unlike Purcell, in the present case, the victims' testimony was not the only evidence that the State presented and their testimony was not unduly inconsistent. One of the minor victims, E.H., testified that McMahon took her to his apartment on several occasions and subjected

her to sexual acts against her will. E.H. testified that a sexual relationship continued for over a year. E.H.'s DNA was found on a comforter from McMahon's bed. McMahon's ex-wife and a police officer testified that McMahon's daughter had described witnessing a sexual act between McMahon and E.H., although the daughter testified that she could not recall making such statements.

McMahon's claim that E.H.'s testimony was inconsistent arises from her testimony (1) that she did not have a problem lying about her age to gain access to an adult website, (2) about a sexual act that she did not mention in police statements or at the preliminary hearing, and (3) that she was "absent-minded."

The second minor victim, S.K., testified that she was babysitting McMahon's daughter, fell asleep on McMahon's bed, and was awoken by McMahon fondling her genital areas.

McMahon's claim that S.K.'s testimony was inconsistent arises from her testimony that (1) she was sleeping soundly when the incident took place, (2) the incident lasted 2 minutes when she first reported that it lasted 20 minutes, and (3) she couldn't identify pictures of McMahon's apartment.

McMahon testified that there was never a sexual relationship with either of the victims but that the girls did babysit his daughter. He testified that he had loaned money to both mothers of the victims and that they did not pay him back. He claimed that the reason for the accusations against him was because the mothers were avoiding paying back the loans and they motivated their daughters to lie. McMahon also testified that he

had fired E.H. because she invited people over and was using his computer to access adult websites.

"[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses." McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Here, the jury was presented with the contradictory testimony of the victims and McMahon and despite the minor inconsistencies in the testimony of the victims, determined that their testimony was credible. Further, contrary to McMahon's contention, there was corroborating evidence supporting E.H.'s testimony, including the discovery of E.H.'s DNA on McMahon's comforter and the nurse practitioner's testimony supporting sexual assault.[1] Thus, there was sufficient evidence presented to support the jury's verdict.

Nurse practitioner's testimony

McMahon contends that the district court erred in allowing Phillis Suiter, a nurse practitioner, to (1) testify as an expert, (2) offer an opinion on the ultimate issue of whether a sexual assault occurred, and (3) improperly render a psychological opinion that E.H. suffered from Graves Disease.

Respecting McMahon's challenge to Suiter's expert qualifications, he argues that she was not qualified to testify because she

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[1]We note that there was no corroborating evidence supporting S.K.'s testimony. However, corroborating evidence would not likely be present because of the nature of McMahon's conduct—lewdness involving touching which occurred once briefly with no witnesses.

was not a doctor. Pursuant to NRS 50.275, a witness may qualify as an expert where the witness possesses "special knowledge, skill, experience, training or education." Determination of the competency of an expert witness is largely in the discretion of the district court. This court reviews a district court's decision regarding expert testimony for abuse of discretion. Mulder v. State, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000).

Suiter testified that she had a bachelor's degree in nursing, specialized training in child sexual abuse, a master's degree in counseling, and had previously testified as an expert witness in 75 to 80 sexual assault cases. Suiter also testified that she has worked as a sexual assault examiner for 14 years and had examined over 2,000 children. We conclude that the district court did not abuse its discretion in determining that Suiter was competent to testify as an expert witness regarding child sexual assault.

As to McMahon's remaining challenges to Suiter's testimony, we conclude that Suiter did not offer an opinion as to the ultimate issue or improperly render a psychological opinion that E.H. suffered from Graves Disease. Suiter testified that the sexual assault examination supported E.H.'s claim that she had been sexually assaulted but did not testify regarding the perpetrator's identity. Townsend v. State, 103 Nev. 113, 118, 734 P.2d 705, 708 (1987) (ruling that expert may offer opinion on whether sexual assault occurred but not on perpetrator's identity). Further, Suiter did not offer an opinion that E.H. suffered from Graves Disease but merely conveyed that E.H.'s medical history revealed that she had been so diagnosed. See NRS 51.115. Because no improper testimony

was presented, we conclude that the district court did not abuse its discretion on the grounds asserted by McMahon.

Improper joinder

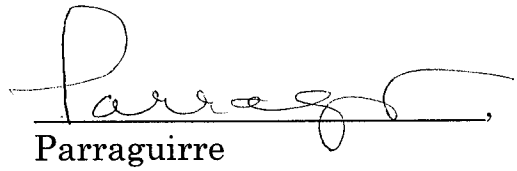
McMahon argues that the counts were improperly joined because the offenses relating to E.H. and S.K. were not part of a common scheme or plan. We disagree. NRS 173.115; Griego v. State, 111 Nev. 444, 449, 893 P.2d 995, 998-99 (1995), abrogated on other grounds by Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000), modified on other grounds by State v. Dist. Ct. (Romano), 120 Nev. 613, 623, 97 P.3d 594, 600 (2004), overruled by Abbott v. State, 122 Nev. 715, 138 P.3d 462 (2006).

Pursuant to NRS 173.115, two or more offenses may be charged in the same information if the offenses are based on the same act or transaction or are part of a common scheme or plan. In Griego, this court found a common scheme or plan where the victims were all the same gender, were friends with Griego's children, and the assaults took place in the same place around the same time. Id. Here, both of the victims were 14 years of age, McMahon invited both victims to his residence to babysit his daughter and sexually assaulted or committed lewd acts with the victims, and the offenses occurred similarly close in time. Further, both victims testified that McMahon offered them $20 following sexual acts. Therefore, we conclude that the district court did not abuse its discretion

in this regard because the offenses were part of a common scheme or plan.[2]

Having considered McMahon's contentions and determined they are without merit, [3] we

ORDER the judgment of conviction AFFIRMED.[4]



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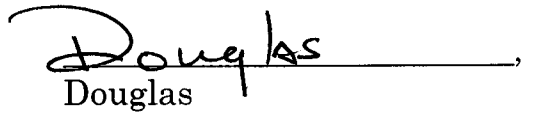

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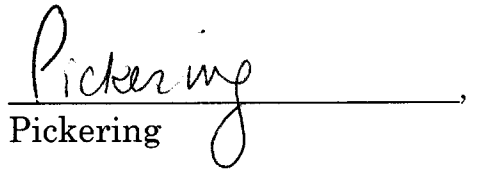
Douglas



_____, J.
Pickering

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[2]Although McMahon also contends that "retroactive misjoinder" applies to his case, see U.S. v. Aldrich, 169 F.3d 526, 528 (8th Cir. 1999), he does not specify what developments occurred, resulting in a retroactive misjoinder or how any such developments prejudiced him. Because he failed to demonstrate that the district court erred on this basis, we deny relief on this claim.

[3]We have received and considered McMahon's proper person documents in this case. His claim of ineffective assistance of trial counsel is more properly raised in a post-conviction petition for a writ of habeas corpus, and thus, we do not address it here. Gibbons v. State, 97 Nev. 520, 523, 634 P.2d 1214, 1216 (1981).

[4]We have determined that oral argument is not warranted in this case. NRAP 34(f),

cc: Hon. David B. Barker, District Judge
Paul E. Wommer
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk