

IN THE SUPREME COURT OF THE STATE OF NEVADA

ISRAEL GARCIA-BORJA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52386

FILED

OCT 07 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, for two counts of sexual assault of a child under the age of fourteen and two counts of lewdness with a child under the age of fourteen. Second Judicial District Court, Washoe County; Brent T. Adams, Judge. The district court sentenced appellant Israel Garcia-Borja to consecutive terms totaling life in the Nevada State Prison with the possibility of parole after thirty years. The remaining terms were imposed concurrently.

On appeal, Garcia-Borja argues that the district court erred in denying his motion for a psychological examination of the victims and responding to questions from the jury without notifying Garcia-Borja. He also claims that the State committed prosecutorial misconduct. We conclude that Garcia-Borja's argument regarding the district court's denial of his motion for a psychological examination lacks merit. However, the district court erroneously failed to inform Garcia-Borja of the questions from the jury, and, given the nature of the questions and the district court's answers, we cannot conclude that the error was harmless. Therefore, we reverse and remand for a new trial. Because we are

remanding for a new trial, we decline to reach Garcia-Borja's arguments regarding prosecutorial misconduct.

Psychological Examination

Garica-Borja argues that the district court erred in denying his motion to conduct a psychological examination of the victims. He asserts that two State witnesses, a police detective and a nurse practitioner, were permitted to give an expert opinion regarding whether the victims' behavior and family patterns fit those of victims of abuse and whether the victims' statements were consistent with the physical examination. The nurse practitioner also testified that one of the victims, whose physical examination did not reveal evidence of abuse, had probably suffered abuse based upon her statement. Garcia-Borja argues that there was little corroboration as only one of the victims displayed slight physical evidence of abuse. Further, he asserts that there was a reasonable basis for believing that the victims' mental or emotional state may have affected their veracity. We conclude that this argument lacks merit.

The overriding consideration in determining whether to permit a psychological examination is whether there is a compelling reason warranting such an examination. Koerschner v. State, 116 Nev. 1111, 1116-17, 13 P.3d 451, 455 (2000), holding modified by State v. District Court (Romano), 120 Nev. 613, 97 P.3d 594 (2004), overruled by Abbott v. State, 122 Nev. 715, 138 P.3d 462 (2006). In resolving this question, the district court must weigh the following factors: (1) whether the State benefits from a psychological or psychiatric expert; (2) whether there is corroborating evidence beyond the testimony of the victim; and (3) whether there is a reasonable basis for believing that the victim's mental or emotional state affected the victim's veracity. Id. at 1116-17, 13 P.3d at

455; see also Abbott, 122 Nev. at 727, 138 P.3d at 470 (reaffirming the test set forth in Koerschner). For the purposes of this analysis, a police detective who interviews a child victim is an expert “when he does more than merely relate the facts and instead analyzes the facts and/or states whether there was evidence that the victim was coached or biased against the defendant.” Abbott, 122 Nev. at 728, 138 P.3d at 471. The district court’s ruling denying a request for a psychological examination of the victim will not be reversed absent an abuse of discretion. Abbott, 122 Nev. at 723, 138 P.3d at 467.

In the instant case, the State benefitted from the use of a psychological expert. Testimony relating to the “behavioral patterns and responses associated with victims of child sexual abuse” may constitute grounds for a witness to be qualified as an expert. Marvelle v. State, 114 Nev. 921, 927, 966 P.2d 151, 154-55 (1998), abrogated on other grounds by Koerschner, 116 Nev. 1111, 13 P.3d 451. Detective Bernandy offered testimony concerning the family patterns and behavior of children in cases of sexual abuse. Specifically, she testified about the scope of behavior that might manifest in child sexual abuse victims. She also stated that she documented certain “family patterns that [she] recognized based on . . . [her] training and experience . . . concerning [the victims]” during her investigation.

As to the second factor in the Koerschner analysis, the victims’ testimony was corroborated. The physical examination of K.M. revealed clefts on her hymen that were consistent with her reports of abuse. Further, the testimony from each victim indicated a common scheme of abuse and corroborated each other.

As to the third factor, Garcia-Borja did not demonstrate that there was a reasonable basis for believing that the victims' mental or emotional state affected the victims' veracity. He asserts that (1) there was some evidence that the victims were exposed to a pornographic film; (2) another relative had abused one of the victims' sisters; (3) K.M. had engaged in "sex games" with a cousin; (4) V.M.'s testimony on cross-examination evidenced just that she was not motivated to lie for her sister's benefit, not that she was concerned that it would be wrong to lie to get someone in trouble; (5) K.M. made repeated statements about getting even with or punishing Garcia-Borja; (6) the victims' testimony was not consistent regarding how they disclosed the abuse to another sister; and (7) V.M. stated that she spoke to K.M. multiple times about the case.

The evidence did not support Garcia-Borja's claims of exposure to pornography, prior sexual abuse, and sexual play. Regarding the exposure to pornography, the only evidence produced was that a charge appeared on a cable bill with no testimony regarding who in the household watched the film. There was no evidence that their father had abused the victims in this case. While the victims' mother testified that her husband had behaved "inappropriately" with one of the victims' sisters, that sister denied any sexual abuse. Regarding the "sex games," the jury heard Garcia-Borja's assertion that K.M. had engaged in sexual play with a cousin; however, both victims testified that the incident, which occurred about nine years prior to trial, merely involved K.M. kissing her cousin, and they were clothed.

Garcia-Borja's remaining assertions do not support a reasonable basis for believing that the victims' mental or emotional states affected their veracity. The asserted testimony merely showed that there

may have been factors that undermined their credibility or they may have been motivated to lie about Garcia-Borja due to general animosity toward him. The factors and motivations did not implicate a mental condition requiring expert testimony to explain. Instead, the exposure of such factors and motivations fell within the purview of cross-examination. Moreover, Garcia-Borja cross-examined the victims about their testimony and motivations to lie.

Therefore, in light of the corroborating evidence of abuse, Garcia-Borja did not present a compelling reason to warrant subjecting the victims to a psychological examination.

Jury Questions

Garcia-Borja argues that the district court erred in responding to questions from the jury without providing notice to him of the questions or the district court's responses to those questions.

NRS 175.451 provides that

After the jury have retired for deliberation, if there is any disagreement between them as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required shall be given in the presence of, or after notice to, the district attorney and the defendant or his counsel.

The district court errs when it fails to notify counsel before communicating on a substantive matter. Daniel v. State, 119 Nev. 498, 511, 78 P.3d 890, 899 (2003). However, where the instructions given are correct, we consider the error harmless. Id.

In the instant case, the jury asked two questions which the district court answered. First, the jury asked, "Any priors of sexual crimes

of the defendant, if we are allowed to know[?]" The district court responded, "You may only consider the evidence submitted during the trial." The district court's failure to notify the defense of this question before answering the question was an error, but that error was harmless because the answer was correct. Evidence of prior crimes is generally inadmissible and no evidence of prior crimes was admitted at trial pursuant to any exception. See NRS 48.045(2).

Second, the jury asked, "What do we need for a conviction?" The district court answered, "Please refer back to Instruction #33." Instruction number 33 provided:

Upon retiring to the jury room you will select one of your number to act as foreperson, who will preside over your deliberations and who will sign a verdict to which you agree.

When all twelve (12) of you have agreed upon a verdict, the foreperson should sign and date the same and request the Bailiff to return you to court.

Garcia-Borja asserts that this answer merely addressed the technical requirements for a verdict and was not sufficient to address all the possible concerns that the question raised. We agree.

The district court erred in failing to notice Garcia-Borja or his counsel before answering the jury's question. We recognize that the instruction was technically a correct answer to the jury's question. However, the answer addressed only one possible meaning of the question, "how does the jury return a verdict?" The answer did not speak to the possibility that the question related to further instruction on the standard of proof or the elements of the crime. Had defense counsel been given an opportunity to address the court, the district court may have provided an answer to the jury's question that more fully addressed all the possible

implications of the question. Therefore, as the district court's answer did not correctly address all the possible concerns raised by the jury's question, we cannot conclude that the district court's failure to inform the defense of the question was harmless.

Having reviewed Garcia-Borja's contentions and concluded that he is entitled to a new trial, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

Cherry, J.
Cherry

Douglas, J.
Douglas

Gibbons, J.
Gibbons

cc: Hon. Brent T. Adams, District Judge
Washoe County Public Defender
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk