IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD GEORGE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52807

FILED

FEB 25 2010

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

ORDER OF AFFIRMANCE

This is an appeal from an amended judgment of conviction, pursuant to a jury verdict, of six counts of sexual assault of a child under 14 years of age and five counts of lewdness with a minor. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

The charges in this case stem from appellant Donald George's sexual abuse of his adoptive daughter, B.G. The case was originally tried in 1985. After a jury returned a guilty verdict, George filed a proper person notice of appeal. Because of a clerical error, the notice was never transmitted to this court. The error was not discovered until 2002, when George filed a petition for a writ of habeas corpus with this court. In George v. State, 122 Nev. 1, 4, 127 P.3d 1055, 1057 (2006), this court concluded that "because the deprivation of this appeal is substantially the result of the omissions of State operatives and the court system itself, the only remedy is to grant a new trial."

In August 2008, the second jury trial began. At the conclusion of the second trial, the jury found George guilty of sexual assault of a minor and lewdness with a minor. This appeal followed.

On appeal, George raises several issues. George first contends that the district court abused its discretion when it denied his motion to dismiss due to the State's alleged failure to preserve material and

exculpatory evidence. Next, George argues that the district court erroneously admitted evidence of prior bad acts. He also assigns error to the district court's decision to allow the testimony of two expert witnesses. He next argues that the convictions for sexual assault and lewdness are redundant and therefore violate his constitutional rights. George further asserts that cumulative error warrants reversal of the judgment of conviction. In addition, George contends that the jury verdict is not supported by sufficient evidence. Finally, George asserts that his current sentence violates his double jeopardy rights because it is in excess of the sentence imposed after his first trial. For the reasons set forth below, we conclude that all of George's arguments are without merit. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

The district court did not err when it denied George's motion to dismiss

George argues that the district court erred when it denied his motion to dismiss based on the State's alleged failure to preserve material and exculpatory evidence. George asserts that the destruction of the first trial's transcript and the sexual assault kit warrants dismissal.

We conclude that the district court did not abuse its discretion when it denied George's motion to dismiss. We determine that George failed to establish that he was prejudiced by the lost evidence. Deere v. State, 100 Nev. 565, 566, 688 P.2d 322, 323 (1984) (noting that when a defendant seeks dismissal due to the State's good faith loss or destruction of evidence, he must demonstrate prejudice by showing that it could be "'reasonably anticipated that the evidence sought would be exculpatory'" (quoting Boggs v. State, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979))).

As the district court noted, the destruction of the sexual assault kit did not prejudice George because the person who performed the sexual assault exam, Dan Berkabile, a forensic toxicologist and chemist, testified at the new trial and confirmed that no semen was found on B.G. George thoroughly cross-examined Berkabile, and the jury heard that there was no DNA evidence linking George to B.G. Further, because approximately 20 years had passed, Berkabile testified from his report, which was part of the discovery available to George. While the evidence from the sexual assault kit itself was lost, the information it contained, which was favorable to George, was not lost but documented in Berkabile's report and therefore George was not prejudiced by the destruction of the evidence from the sexual assault kit.

Additionally, B.G.'s testimony was clear and corroborated by her mother and brother, A.G., as well as physical evidence. See Deere, 100 Nev. at 566, 688 P.2d 323 (rejecting appellant's contention that the lost evidence undermined his ability to defend himself because there was substantial evidence against him, namely, the victim's clear testimony which was corroborated by other testimony and physical evidence). There was substantial evidence of guilt in the corroborated testimonies of George's family members, as well as that of Dr. Karch, who testified that B.G.'s lack of a hymen was a sign of repeated sexual penetration. We therefore conclude that George failed to make the requisite showing of prejudice pursuant to Deere, and hold that the district court did not abuse its discretion when it denied George's motion to dismiss.

The district court did not abuse its discretion when it admitted evidence of other bad acts

George argues that he was deprived of his right to a fair trial because the district court allowed F.M. to testify. F.M. is the daughter of

George's former girlfriend. She was on the witness list for George's first trial. The district court allowed F.M. to testify as to what she saw while she lived with George. For the reasons set forth below, we determine that the district court acted within its discretion in allowing F.M. to testify.

"A district court's decision to admit or exclude evidence of prior bad acts rests within its sound discretion and will not be reversed by this court on appeal absent manifest error." Somee v. State, 124 Nev. ___, ___, 187 P.3d 152, 160 (2008). NRS 48.045(2) states:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Prior bad act evidence is presumptively inadmissible. Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 677 (2006). Prior bad act evidence is inadmissible to show propensity for sexual deviation. Braunstein v. State, 118 Nev. 68, 75, 40 P.3d 413, 418 (2002).

To overcome the presumption of inadmissibility and ensure that the evidence is not offered to show a propensity for sexual deviation,

> the district court must [hold] a hearing outside the presence of the jury and determine "that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."

Diomampo v. State, 124 Nev. ___, ___, 185 P.3d 1031, 1041 (2008) (quoting Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)). If evidence of the prior bad act is admitted, the district court must then issue a limiting instruction to the jury about the limited use of bad act evidence,

unless waived by the defendant. See, e.g., Mclellan v. State, 124 Nev. ___, ___, 182 P.3d 106, 110-11 (2008).

The district court held a hearing outside the presence of the jury and determined that F.M.'s testimony was clear, convincing, and probative. It made no finding as to whether the testimony was unfairly prejudicial until after it heard B.G.'s testimony. During B.G.'s testimony, as the defense cross-examined B.G., it asked B.G. whether any of the other children were asked to stay at home alone with George. The line of questioning was essentially about whether any of the other children in the household were sexually abused. The district court determined that because the defense raised the issue of George sexually abusing other children, the State could present F.M.'s testimony because it was relevant to show the complete story of the crime and was not prejudicial to the defendant. We agree.

F.M.'s testimony was relevant to demonstrate a common scheme or plan because it showed George's attraction to young females, his desire to engage in sexual activity with young girls who were not biologically related to him, and his preference for many of the same types of acts. See Ledbetter, 122 Nev. at 260-61, 129 P.3d at 677-78 (in explaining the common-scheme-or-plan exception of NRS 48.045(2), stating that it is applicable when the similarities between the charged act and prior bad act tend to establish "an overarching and explicitly preconceived plan").

Moreover, F.M.'s testimony was relevant to show motive. The State was charged with explaining to the jury what would motivate an adoptive father to inflict such harm on his young daughter, and F.M.'s testimony helped establish that motive. See Ledbetter, 122 Nev. at 262,

129 P.3d at 679 (explaining that what motivates a defendant to repeatedly sexually abuse his victims is relevant to the State's prosecution and can be established by evidence of prior acts of abuse).

Additionally, we determine that F.M.'s testimony was clear and convincing because it was unambiguous and her memory was not hindered despite the passing of time. F.M.'s testimony was detailed and specific.

Lastly, the probative value of explaining to the jury what motivated George to repeatedly subject his young adopted daughter to sexual abuse was highly probative. See id. at 263, 129 P.3d at 679 (explaining that the probative value of explaining why defendant would repeatedly harm a young stepdaughter was very high). Further, because the charges against George were not weak (due to the fact that B.G.'s testimony was clear and corroborated by other testimony and physical evidence), the admission of F.M.'s testimony did not heighten the likelihood of unfair prejudice. See id. (explaining that evidence of prior bad acts when presented to bolster otherwise weak charges can raise "the likelihood of unfair prejudice"). We further note that F.M.'s testimony was not highly prejudicial to George because F.M. testified that she never witnessed George sexually abusing any of the other children, including B.G. Accordingly, we determine that the probative value of F.M.'s testimony was not substantially outweighed by the danger of unfair prejudice.

Because the district court held a hearing outside the presence of the jury, determined that the presumption of inadmissibility was rebutted by the three-factor test for admissibility, and gave a limiting instruction regarding the testimony, we conclude that there is no evidence

of manifest error and affirm the district court's ruling regarding F.M.'s testimony.

The district court acted within its discretion when it allowed expert witness testimony

George argues that his right to a fair trial was violated because the district court allowed Dr. Steven Karch to testify as an expert, even though he is not an adolescent gynecologist. He further asserts that Berkabile should not have testified as an expert because the State did not properly provide notice. We determine that George's arguments are without merit.

In Nevada, NRS 50.275 governs expert witness admissibility and states:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.

In Hallmark v. Eldridge, this court stated that "[i]f a person is qualified to testify as an expert under NRS 50.275, the district court must then determine whether his or her expected testimony will assist the trier of fact in understanding the evidence or determining a fact in issue." 124 Nev. ___, ___, 189 P.3d 646, 651 (2008). This court reviews a district court's decision regarding expert testimony for abuse of discretion. Id. at ___, 189 P.3d at 651.

For the following reasons, we conclude that Dr. Karch was properly qualified as an expert witness: he completed an internship that included a three month obstetrics/gynecology rotation at an Oakland, California, hospital; he had years of experience in family practice; he had

substantial experience practicing medicine around the world; he was a practicing physician and the director of the emergency room at University Medical Center (UMC); and while at UMC, he performed numerous sexual assault exams. In addition, Dr. Karch was the physician who performed the sexual assault exam on B.G. and therefore had specific knowledge as to this case. Accordingly, as a doctor who had taken classes in and practiced gynecology throughout an extensive career, Dr. Karch's testimony assisted the jury in understanding the evidence of B.G.'s sexual assault exam. Therefore, the district court did not abuse its discretion when it ruled that Dr. Karch could testify as to the scope of his special knowledge, skill, experience, and training.

Similarly, Berkabile was properly qualified as an expert witness for the following reasons: his area of expertise was toxicology; he had a bachelor's degree in chemistry; he had been the supervisor of the toxicology department at UMC; he had analyzed as many as 300 sexual assault kits; and he analyzed B.G.'s sexual assault kit. Berkabile testified as to the scope of his knowledge and expertise and explained the results of B.G.'s sexual assault exam. Berkabile's knowledge was helpful because, at one point, the district court stopped Berkabile's testimony to ask for a definition of acid phosphatase. Berkabile helped the jury understand the vocabulary associated with the sexual assault exam, as well as the reasons why there was no DNA evidence found in B.G.'s case by explaining the lifespan of acid phosphatase. Accordingly, we conclude that the district

court acted within its discretion when it allowed Berkabile to testify as an expert witness.[1]

George's convictions are not redundant

George argues that three of the counts he was convicted of were all part of a single act of sexual assault and cannot stand as separate convictions. George's argument fails.

This court applies de novo review to questions of law. Collins v. State, 125 Nev. ___, ___, 203 P.3d 90, 91 (2009). NRS 200.366(1) defines sexual assault in the following manner:

> A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or another, or on a beast, against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault.

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[1]As to the issue of proper notice, George contends that he suffered prejudice because the State did not timely supply Berkabile's curriculum vitae. We determine that George fails to demonstrate how he was prejudiced by the testimony of a witness who confirmed that George's DNA was never found upon the victim. Further, this court has stated that there is a strong presumption to allow even late-disclosed witnesses. See Sampson v. State, 121 Nev. 820, 827-28, 122 P.3d 1255, 1260 (2005) (explaining that even a late-noticed witness should be allowed to testify if the testimony "goes to the heart of the case" and if the other party anticipated the witness). Accordingly, we conclude that the district court acted within its discretion when it allowed Berkabile to testify as an expert.

Lewdness, in relevant part, is defined as the willful and lewd commission of

> any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child.

NRS 201.230(1). We have recognized that "[t]he crimes of sexual assault and lewdness are mutually exclusive and convictions for both based upon a single act cannot stand." Braunstein v. State, 118 Nev. 68, 79, 40 P.3d 413, 421 (2002). Further, we have held that conduct incidental to the sexual assault, which is not separate and distinct, cannot be susceptible to a separate lewdness conviction. Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 285 (2004).

George takes issue with the counts that charged him with (1) inserting his penis in B.G.'s mouth, (2) forcing B.G. to perform oral sex upon her mother, and (3) fondling B.G.'s vaginal area. However, the testimony at trial established that these acts were not incidental to the sexual assaults and were indeed separate and distinct. B.G. testified that there was vaginal penetration the first time George had sexual intercourse with her but no oral sex occurred and her mother was not part of the act. She further testified that the night before she reported the sexual abuse, George had only vaginal intercourse with her. Additionally, B.G.'s mother testified that she had to watch George and B.G. have vaginal intercourse on more than one occasion. B.G.'s mother testified that on other occasions George would make B.G. perform oral sex on her. Finally, B.G.'s testimony reflected an overall variation on the types of sexual contact that occurred between her and George. Accordingly, we determine that

George's convictions for sexual assault and lewdness are not redundant and should be affirmed.

George's double jeopardy rights were not violated

In his next assignment of error, without citing to any authority, George asserts that the district court violated his double jeopardy rights because his current sentence exceeds the prior sentence imposed after the first trial. George's argument is meritless.

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, which applies to the states through the Fourteenth Amendment, states that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V; see State v. Lomas, 114 Nev. 313, 315, 955 P.2d 678, 679 (1998). The double jeopardy protection is triggered by the following three occurrences: (1) if a defendant is acquitted and faces a second prosecution for the same offense, (2) if a defendant is convicted and faces a second prosecution for the same offense, and (3) if the defendant receives multiple punishments for the same offense. See Lomas, 114 Nev. at 315, 955 P.2d at 679.

We conclude that George's argument fails because his case does not implicate the Double Jeopardy Clause. George was not acquitted, nor did he receive multiple punishments for the same offense. Further, the second trial was not a retrial for the same offenses—it was a new trial. George's conviction from the first trial was reversed and remanded for a new trial. Therefore, there was no final judgment upon which the protections of the Double Jeopardy Clause would apply and George did not have a reasonable expectation that his original sentence was final. See Miranda v. State, 114 Nev. 385, 386, 956 P.2d 1377, 1378 (1998) ("The

Double Jeopardy Clause of the United States Constitution precludes courts from increasing a sentence when the defendant has a reasonable expectation that the sentence is final.").

Sufficient evidence supports George's conviction

George challenges the sufficiency of the evidence presented at trial, arguing that the evidence does not support a guilty verdict. We disagree.

When reviewing the sufficiency of the evidence, this court considers "'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, 123 Nev. at 202, 163 P.3d at 414 (quoting Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998)). Specifically, when determining the sufficiency of the evidence in sexual assault cases, this court has held that the victim's testimony alone—without corroboration—is sufficient to affirm a conviction. Rose, 123 Nev. at 203, 163 P.3d at 414. Additionally, this court has determined that it is not this court's function, but rather that of the jury, to weigh the credibility of the evidence presented. Id. at 202-03, 163 P.3d at 414.

For the following reasons, we conclude that there was sufficient evidence to support the jury verdict: B.G.'s testimony was specific and clear, with detailed accounts of the sexual abuse; B.G.'s mother corroborated B.G.'s testimony regarding George forcing the two of them to perform sexual acts upon each other in his presence and upon him; A.G. corroborated B.G.'s testimony that it was George who forced B.G. to approach A.G. and have sexual intercourse with him; A.G. corroborated B.G.'s testimony that both of them did not want to perform

sexual acts upon each other and were scared of George and the consequences of disobeying his orders; F.M.'s testimony showed motive and common scheme or plan because it showed that George had an interest in young females who were not biologically related to him; F.M. and B.G. both testified that George asked them to urinate on him; Dr. Karch testified that the only reason a young girl the age of B.G. would have absolutely no hymen was repeated vaginal penetration; and Berkabile testified that the reason no acid phosphatase, and therefore sperm, was found in B.G.'s vaginal cavity was because too many hours had passed from the last act of sexual intercourse to the sexual assault exam. We therefore determine that given the substantial evidence against George, a rational jury could have found George guilty beyond a reasonable doubt and therefore there was sufficient evidence supporting the conviction.

Cumulative error does not warrant reversal

George argues that cumulative error adversely affected the fairness of the trial. George's assertion is meritless.

In reviewing claims of cumulative error, this court considers the following three factors: (1) the closeness of the issue of guilt, (2) number and quality of assigned errors, and (3) the seriousness of the crime charged. Rose v. State, 123 Nev. 194, 211, 163 P.3d 408, 419 (2007).

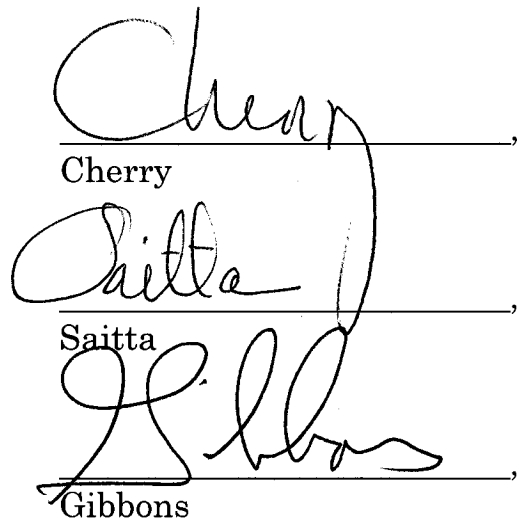
We determine that there was compelling evidence of George's guilt, including the corroborated testimonies of B.G., B.G.'s mother, and A.G. Further, all three of these witnesses and F.M. testified that they feared George and the consequences they would face if they denied him. The testimony of all four witnesses was consistent regarding how George would give directions during the instances of sexual contact. As to

physical evidence, Dr. Karch testified that the fact that B.G. did not have a hymen was indicative of repeated sexual penetration. And Berkabile explained that it was likely that there was no evidence of acid phosphatase, and thus, no seminal fluid in B.G.'s vaginal canal, because so many hours passed between the last instance of sexual intercourse and the physical exam. Accordingly, we determine that the issue of guilt was not close.

As to the quantity and quality of the errors George assigns, we conclude that his assignments of error are meritless. Therefore, even though the crime charged is serious, because the issue of guilt is not close and there is no error on the record, there is no cumulative error warranting reversal.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

cc: Eighth Judicial District Court Dept. 15, District Judge
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