IN THE SUPREME COURT OF THE STATE OF NEVADA

GEORGE JOHN WHITE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 34828

FILED

FEB 07 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of two counts of sexual assault on a minor under sixteen years of age, one count of lewdness with a minor under fourteen years of age, and two counts of open or gross lewdness.

The district court sentenced appellant George John White to consecutive terms of life with the possibility of parole after twenty years for each of the two counts of sexual assault on a minor under sixteen years of age, to a consecutive term of life with the possibility of parole after ten years for the count of lewdness with a child under fourteen years of age, and two concurrent terms of one year for each of the two counts of open or gross lewdness.

White first contends that the evidence adduced at trial was insufficient to support his convictions.

"[W]hen the sufficiency of the evidence is challenged on appeal in a criminal case, '[t]he relevant inquiry for this Court 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[s] beyond a reasonable doubt."'" Hutchins v. State, 110 Nev. 103, 107-08, 867 P.2d 1136, 1139 (1994) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); see also

McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 576 (1992) (circumstantial evidence alone may support a conviction).

Our review of the record reveals sufficient evidence from which the jury, acting reasonably and rationally, could have found the elements of two counts of sexual assault on a minor under sixteen years of age. See e.g. LaPierre v. State, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992). This court has repeatedly held that the testimony of a sexual assault victim alone is sufficient to uphold a conviction.

The victim in this case testified with particularity at trial regarding one incident of digital penetration and at least one incident of penile penetration. Furthermore, it is for the jury to determine what weight, credibility and credence to give to witness testimony and other trial evidence. See Hutchins, 110 Nev. at 107, 867 P.2d at 1139. Although some aspects of the victim's testimony differed from her mother's testimony, the mother's testimony concerning the number of incidents and the type of abuse that occurred in those instances generally corroborated the victim's testimony. Accordingly, we conclude that White's convictions of two counts of sexual assault on a minor under sixteen years of age are supported by substantial evidence.

Our review of the record also reveals sufficient evidence from which the jury, acting reasonably and rationally, could have found the elements of two counts of open or gross lewdness. See NRS 201.210. Contrary to White's contention, acts which are committed in a private place, i.e., a motel room, but which are nevertheless committed in an "open" as opposed to a "secret" manner fall within the purview of NRS 201.210. See Ranson v. State, 99 Nev. 766, 767-68, 670 P.2d 574, 575 (1983). Additionally, a conviction under NRS 201.210 does not require proof of intent to offend an observer

or even that the exposure was observed. See Young v. State, 109 Nev. 205, 215, 849 P.2d 336, 343 (1993). It is sufficient that the public or "open" sexual conduct or exposure was intentional. See id. At trial, the victim in this case testified that she observed White and her mother engaged in sexual intercourse in the bed next to her on two occasions, and the mother's testimony corroborated the victim's testimony. Accordingly, we conclude that White's convictions of two counts of open or gross lewdness are supported by substantial evidence.

Turning to White's conviction of lewdness with a child under fourteen years of age, we conclude that this count was not supported by substantial evidence. This court has stated that "the crimes of lewdness with a child under the age of fourteen and sexual assault are mutually exclusive." State v. Koseck, 113 Nev. 477, 478-79, 936 P.2d 836, 837 (1997) (citing Townsend v. State, 103 Nev. 113, 734 P.2d 705 (1987)). Specifically, the lewdness statute expressly excludes from its purview "acts constituting the crime of sexual assault." NRS 201.230. Thus, multiple convictions for lewdness and sexual assault based on the same act would not comport with legislative intent and would be unlawful. See Koseck, 113 Nev. at 479, 936 P.2d at 838.

In this case, the amended information charged White with two counts of sexual assault for alleged penile penetration (count I) and alleged digital penetration (count II) of the victim. The amended information also charged White with one count of lewdness with a child under fourteen years of age for fondling the vaginal area of the victim (count V). The evidence adduced at trial proved that White subjected the victim to digital penetration on one occasion and penile penetration on two occasions. Although the State was free to

charge sexual assault and lewdness as alternative counts, White's single act of digital penetration of the victim cannot support convictions for both count II and count V. See Townsend, 103 Nev. at 120-21, 734 P.2d at 710 (lubricating victim's vaginal area, taking hand away and putting more lubricating substance on finger, and then penetrating child's vagina is single act of sexual assault). Accordingly, we conclude that White's conviction of lewdness with a child under fourteen years of age, count V, must be reversed.

White also contends that the admission of an out-of-court statement implicating him in the sexual assault was reversible error. Specifically, White argues that the district court erred by failing to hold a hearing pursuant to NRS 51.385 to determine whether the victim's statement to a nurse was trustworthy prior to admitting the nurse's testimony at trial.

NRS 51.385 requires a hearing for the purpose for determining the trustworthiness of an offered hearsay statement of a child describing sexual conduct prior to the statement being brought before the jury. See NRS 51.385. However, under the opening phrase of NRS 51.385(1), this hearing is required unless the hearsay is otherwise admissible under a recognized exception to the hearsay rule. See NRS 51.385(1); see also Lytle v. State, 107 Nev. 589, 591, 816 P.2d 1082, 1083 (1991). NRS 51.115, a firmly rooted exception to the hearsay rule, provides that "statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof are not inadmissible under the hearsay rule insofar as they were reasonably pertinent to diagnosis or treatment." NRS 51.115.

The district court in this case determined that the victim's hearsay statement was admissible pursuant to NRS 51.115 as a statement made for purposes of medical diagnosis or treatment, and the nurse was permitted to testify that during the medical examination the victim told her that White had touched her in her private area with his finger. The record supports the district court's determination that the victim's statement was made for the purpose of medical diagnosis or treatment. Thus, we conclude that the admission of the victim's out-of-court statement was not error.

Accordingly, we affirm White's conviction of two counts of sexual assault with a minor under sixteen years of age and two counts of open or gross lewdness. We reverse his conviction of lewdness on a child under fourteen years of age and remand this matter to the district court for entry of an amended judgment of conviction.

Young, J.

Rose, J.

Becker, J.

cc: Hon. Donald M. Mosley, District Judge
Attorney General
Clark County District Attorney
Clark County Public Defender
Clark County Clerk