IN THE SUPREME COURT OF THE STATE OF NEVADA

PHILIP M. DREYFUSS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53376

FILED

SEP 28 2010

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of lewdness with a minor under the age of 14 years. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Appellant Philip Dreyfuss was charged with eight counts of lewdness with a minor under the age of 14 and five counts of sexual assault with a minor under 14 years of age. The charges in this case stem from Dreyfuss's sexual abuse of his daughter, S.D. The jury found Dreyfuss guilty on two counts of lewdness but returned a not guilty verdict on the remaining eleven counts. Dreyfuss now appeals the judgment of conviction.

On appeal, Dreyfuss assigns numerous errors that he asserts warrant reversal: (1) the district court erred in determining that his statement to detectives was knowing, voluntary, and intelligent; (2) the district court erred by allowing improper testimony; (3) the district court erred by admitting prior bad act evidence; (4) the district court abused its discretion by admitting hearsay testimony; (5) the district court erred in providing various jury instructions; (6) his two lewdness convictions violate double jeopardy; and (7) the State presented insufficient evidence to support his convictions.

For the reasons set forth below, we conclude that all of Dreyfuss's contentions are without merit. Accordingly, we affirm the judgment of conviction. As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

Statements to detectives

Dreyfuss argues that the district court erred in determining that he knowingly and intelligently waived his Miranda rights and that his statement to detectives was voluntary. Specifically, he contends that he did not knowingly and intelligently waive his Miranda rights because he was under the influence of several prescription medications, including two narcotics, at the time of his interrogation, and that his statement to detectives was involuntary because it was induced by coercive interrogation techniques.

Knowing and intelligent

Whether a waiver is knowing and intelligent is a question of fact and is reviewed for clear error. Mendoza v. State, 122 Nev. 267, 276, 130 P.3d 176, 181 (2006). A defendant's statements made during custodial interrogation may be admitted at trial only after Miranda rights have been administered and validly waived. Koger v. State, 117 Nev. 138, 141, 17 P.3d 428, 430 (2001). A valid waiver of rights under Miranda must be knowing and intelligent. Miranda v. Arizona, 384 U.S. 436, 444 (1966); see also Mendoza, 122 Nev. at 276, 130 P.3d at 181. We employ a totality-of-the-circumstances test in reviewing whether a defendant's waiver was knowing and intelligent. Mendoza, 122 Nev. at 276, 130 P.3d at 181-82. "Intoxication without more will not preclude the admission of incriminating statements unless it is shown that the defendant was so intoxicated that he was unable to understand the meaning of his

statements." Stewart v. State, 92 Nev. 168, 170-71, 547 P.2d 320, 321 (1976).

The record demonstrates that Dreyfuss was informed of his Miranda rights at the beginning of the interrogation, that he understood those rights, and that he willingly agreed to speak to the detectives. Throughout the interrogation, Dreyfuss was alert, properly oriented to questioning, thoughtful in his responses, and was able to appropriately answer questions regarding his home life, medications, and illnesses. He was even able to recall, with detail, a variety of events that had occurred during the week prior to his interrogation. We are convinced that the totality of circumstances demonstrates that Dreyfuss was fully informed of his Miranda rights, that he was able to comprehend those rights, and that he understood the meaning of his statements. Accordingly, the district court did not err in finding that Dreyfuss knowingly and intelligently waived his Miranda rights.

Voluntary

"[W]hether a waiver is voluntary is a mixed question of fact and law that is . . . reviewed de novo." Mendoza, 122 Nev. at 276, 130 P.3d at 181. "A confession is admissible only if it is made freely and voluntarily, without compulsion or inducement. Passama v. State, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987). "In order to be voluntary, a confession must be the product of a 'rational intellect and a free will.'" Id. at 213-14, 735 P.2d at 322 (quoting Blackburn v. Alabama, 361 U.S. 199, 208 (1960)). We employ a totality-of-the-circumstances test to determine whether the defendant's will was overborne when he confessed. Mendoza, 122 Nev. at 276, 130 P.3d at 181-82. Factors relevant to voluntariness include "'[t]he youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of

detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep.'" Dewey v. State, 123 Nev. 483, 492, 169 P.3d 1149, 1155 (2007) (quoting Alward v. State, 112 Nev. 141, 155, 912 P.2d 243, 252 (1996), overruled in part on other grounds by Rosky v. State, 121 Nev. 184, 111 P.3d 690 (2005)).

Dreyfuss was 41 years old at the time of the interrogation and had received a high school diploma, attended college courses, and accumulated 2,600 hours of cosmetology experience. He was advised of his Miranda rights, acknowledged that he understood those rights, and was only detained for approximately one hour and fifteen minutes. The record demonstrates that the first half hour of the interrogation was a general discussion between Dreyfuss and the detectives, without any specific questions regarding the sexual abuse allegations. About half an hour into the interrogation, one of the detectives entered the room and confronted Dreyfuss with the allegations against him. Thus, the nature of the questioning was not repeated or prolonged as he was only questioned by the detectives about the allegations for approximately forty-five minutes.

We disagree with Dreyfuss's contention that the detectives' interrogation techniques were improper. Dreyfuss places emphasis on a few comments made by Detective Baltas, which occurred over a ten minute period, where Detective Baltas encouraged Dreyfuss to confess in order to help Dreyfuss's children deal with the incident. Detective Baltas also expressed sympathy and minimized the seriousness of the charges against Dreyfuss. These interrogation techniques, however, are permissible. See Sheriff v. Bessey, 112 Nev. 322, 328, 914 P.2d 618, 621-22 (1996) (interrogation techniques such as offering false sympathy and minimizing the seriousness of the charges are permissible as long as they

do not produce "inherently unreliable statements or revolt our sense of justice"). Further, as Detective Baltas picked up the questioning in a more aggressive fashion, Dreyfuss remained authoritative and guarded in his responses. Notably, the interrogation ended upon Dreyfuss's request for a lawyer. We conclude that the totality of the circumstances demonstrates that Dreyfuss's will was not overborne during the interrogation and that his confession was the product of a rational intellect and a free will. Therefore, the district court did not err in determining that his confession was voluntary.[1]

Improper admission of testimony

Dreyfuss argues that the testimony of Dr. Zbiegien, a doctor who examined S.D., and Mary Jane Tomassetti, a Child Protective Services (CPS) investigator, was improperly admitted by the district court. Dreyfuss failed to object to this testimony and therefore we employ plain error review. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

Dr. Zbiegien

Dreyfuss contends that Dr. Zbiegien gave improper testimony—specifically, that his testimony was irrelevant and prejudicial,

---

[1]We note Dreyfuss's argument with respect to the district court's failure to redact a portion of his statement to detectives concerning his threat to punch S.D. in the stomach should she become pregnant. On appeal, however, Dreyfuss has asserted new grounds for objection and therefore we employ plain error review. Grey v. State, 124 Nev. 110, 120, 178 P.3d 154, 161 (2008). We conclude that Dreyfuss has failed to demonstrate how that portion of his statement to detectives caused him actual prejudice or resulted in a miscarriage of justice in light of the substantial evidence against him. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

was not based on scientific fact, rendered improper legal conclusions, and engaged in improper witness vouching.

In Nevada, NRS 50.275 governs the admissibility of expert witness testimony. NRS 50.275 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.

Dr. Zbiegien testified that he is a licensed and board certified pediatrician and as part of his education as a doctor he received training in evaluating cases of child abuse or suspected child abuse. Dr. Zbiegien testified that, for approximately 11 years, he has been the medical director and part of the child abuse team at Sunrise Children's Hospital. He testified that he has conducted sexual abuse examinations on children for approximately 17 years and has been qualified as an expert witness in the area of child abuse approximately 1,040 times. He also personally conducted the physical examination of S.D. Thus, Dr. Zbiegien testified about matters within the scope of his special knowledge, experience, and education.

Based on his experience, Dr. Zbiegien testified that it is common to have a normal exam when a case involves allegations such as the type made in this case, namely, digital penetration, genital fondling, and cunnilingus. Dr. Zbiegien specifically stated that he was not testifying as to whether or not S.D. was actually sexually assaulted, but rather, his testimony was limited to his medical findings. Accordingly, Dr. Zbiegien's testimony was helpful to the trier of fact and did not exceed the scope of matters upon which he could opine as a properly qualified expert.

The record does not support Dreyfuss's contention that Dr. Zbiegien offered a legal opinion as to the definition of sexual assault; rather, as noted above, he merely testified that a normal examination is common when a case involves allegations such as S.D.'s. Lastly, Dr. Zbiegien did not impermissibly vouch for S.D. His testimony was based on his knowledge and experience and his examination of S.D. The record does not reveal any instance where Dr. Zbiegien references S.D. or her testimony. For the foregoing reasons, we conclude that Dr. Zbiegien rendered proper expert testimony and therefore the district court did not commit plain error in allowing his testimony.

CPS investigator Tomassetti

Dreyfuss asserts that the district court erred when it allowed CPS investigator Tomassetti to state that S.D. "gave a great interview." Generally, it is improper for a witness to vouch for the testimony of another by testifying as to the truthfulness of their testimony. Lickey v. State, 108 Nev. 191, 196, 827 P.2d 824, 827 (1992).

At trial, Tomassetti was asked what her perception was of the interview she had with S.D. Tomassetti responded that S.D. "gave a great interview" and "a lot of information and details." The record shows that Tomassetti did not testify as to the veracity of S.D.'s testimony; rather, she testified about the quality of the interview. Accordingly, the district court did not commit plain error in allowing Tomassetti to testify that S.D. "gave a great interview."

Bad act evidence

Dreyfuss challenges various pieces of evidence that he argues amounted to inadmissible bad act evidence. Dreyfuss failed to preserve

the following issues for appeal.[2] Accordingly, we review them for plain error. Green, 119 Nev. at 545, 80 P.3d at 95.

Pursuant to NRS 48.045(2),

> [e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person 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.

Bad act evidence is presumptively inadmissible. Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 677 (2006). To overcome this presumption, the district court must hold a hearing, outside the presence of the jury, Petrocelli v. State, 101 Nev. 46, 51-52, 692 P.2d, 503, 507-08 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 133-34, 930 P.2d 707, 711-12 (1996), and superseded in part by statute as stated in Thomas v. State, 120 Nev. 37, 45, 83 P.3d 818, 823 (2004), to 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

---

[2]Dreyfuss also contends that the district court erred in admitting the following bad act evidence: (1) the testimony of A.D. (S.D.'s brother) about the bookmarks of child pornography sites on Dreyfuss's computer, (2) Pamela Reed's testimony that S.D. had complained to her about Dreyfuss throwing dinner against the wall, and (3) A.D.'s testimony about going on cigarette runs for Dreyfuss. Dreyfuss failed to object to Reed's testimony and has asserted new grounds for objection on appeal with respect to the bookmarks of child pornography and the cigarette runs. Accordingly, we employ plain error review. Grey, 124 Nev. at 120, 178 P.3d at 161; Green, 119 Nev. at 545, 80 P.3d at 95. We conclude that Dreyfuss has failed to demonstrate how the evidence caused him actual prejudice or resulted in a miscarriage of justice in light of the substantial evidence against him.

of the evidence is not substantially outweighed by the danger of unfair prejudice." Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

Failure to conduct a Petrocelli hearing is reversible error, unless "'(1) the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of bad acts evidence set forth in Tinch; or (2) where the result would have been the same if the trial court had not admitted the evidence.'" Rhymes v. State, 121 Nev. 17, 22, 107 P.3d 1278, 1281 (2005) (quoting Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998)).

The "Bitch Program"

Dreyfuss argues that A.D. and S.D.'s testimony regarding the "Bitch Program" constituted inadmissible bad act evidence.

While there was no Petrocelli hearing regarding the "Bitch Program" evidence, the record is sufficient for us to determine that the evidence is admissible under Tinch. S.D. testified that Dreyfuss put only her on the "Bitch Program" and not her brother, A.D. She testified that when she was on the program, she was required to be the "pet," while Dreyfuss was the master. S.D. was also not allowed to wear a bra or underwear and had to masturbate every night while on the program. She testified that Dreyfuss would cuddle with her at night to check whether or not she was wearing a bra and underwear. Importantly, the events which led to Dreyfuss fondling and licking S.D.'s breasts and digitally penetrating her vagina all commenced because Dreyfuss got into bed with S.D. to see if she was wearing her bra and underwear. Evidence of the "Bitch Program" tended to prove Dreyfuss's intent and plan to coerce S.D. into engaging in sexual conduct.

S.D. and A.D.'s testimony about the program was detailed, specific, and subject to cross-examination by Dreyfuss. Dreyfuss's creation of the program and act of placing S.D. on it was proven by clear and convincing evidence. Testimony and evidence of the program was not unduly prejudicial in light of its high probative value in revealing Dreyfuss's intent and plan to sexually abuse S.D. and therefore the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Because evidence of the "Bitch Program" is admissible under Tinch, we conclude that the district court did not commit plain error by admitting the evidence.

The exercise regimen

Dreyfuss asserts that A.D. and S.D.'s testimony regarding the exercise regimen was inadmissible bad act evidence. The record, however, demonstrates that the State did not offer evidence of the exercise regimen in order to show that Dreyfuss sexually assaulted or committed a lewd act with S.D. Rather, the State offered the evidence to give foundation and context to S.D.'s conversation with A.D. about Dreyfuss's sexual abuse. Notably, S.D. told A.D. about Dreyfuss's sexual abuse while they were running as part of the exercise regimen. We determine that the district court did not commit plain error in admitting the evidence.

The incest discussion

Dreyfuss contends that the district court erred when it allowed A.D. to testify that Dreyfuss had discussed incest with him and S.D. because it constituted inadmissible bad act evidence. In this case, the State did not request a Petrocelli hearing regarding the incest discussion and the district court did not make the requisite Petrocelli determinations. Having reviewed the record, we believe that it is insufficient for us to determine if the incest discussion is admissible under Tinch due to A.D.'s

short testimony on the topic. Nonetheless, pursuant to Rhymes, we conclude that the jury's verdict would have been the same had the district court not admitted A.D.'s testimony about the incest discussion. A.D.'s testimony concerning the discussion was short, and the State did not incorporate the incest discussion into its closing argument. Moreover, there was substantial evidence supporting Dreyfuss's conviction, given S.D.'s testimony, the DNA evidence corroborating S.D.'s testimony, and Dreyfuss's statement to the detectives. Thus, we conclude that the result would have been the same had the district court not have admitted the evidence, especially in light of the DNA evidence. Accordingly, the district court did not commit plain error by allowing A.D. to testify about the incest discussion.[3]

Hearsay testimony

Dreyfuss asserts that the district court abused its discretion when it allowed A.D. to testify that his sister, S.D., told him that Dreyfuss was inappropriately touching her. Dreyfuss contends that A.D.'s

---

[3]Dreyfuss argues that the district court's error in admitting the bad act evidence was compounded when it failed to provide a limiting instruction upon admission of the evidence and in the written instructions to the jury. We determine that the district court's failure to do so did not have a substantial and injurious effect or influence in determining the jury's verdict, as the evidence against Dreyfuss was substantial, namely, S.D.'s testimony, the DNA evidence corroborating S.D.'s testimony, and Dreyfuss's statement to the detectives. See Tavares v. State, 117 Nev. 725, 731-32, 30 P.3d 1128, 1132 (2001) (explaining that where a prosecutor fails to request an instruction on the limited use of bad act evidence and the district court does not raise the issue sua sponte, we review "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict'" (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946))).

testimony constituted inadmissible hearsay and that the district court erred in admitting A.D.'s testimony as a prior consistent statement.[4]

The decision to admit or exclude evidence is within the sound discretion of the district court, and we review that decision for an abuse of discretion. Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006). Pursuant to NRS 51.065, hearsay generally is inadmissible. A prior consistent statement, however, is not hearsay if: (1) "'[t]he declarant testifies at the trial,'" (2) the declarant is "'subject to cross-examination concerning the statement,'" (3) the statement is "'[c]onsistent with [the declarant's] testimony'" at trial, and (4) the statement is "'offered to rebut an express or implied charge . . . of recent fabrication or improper influence or motive.'" Patterson v. State, 111 Nev. 1525, 1531, 907 P.2d 984, 988 (1995) (quoting NRS 51.035(2)). Additionally, the prior consistent statement, to be admissible, "'must have been made at a time when the [declarant] had no motive to fabricate.'" Id. at 1532, 907 P.2d at 989 (quoting Smith v. State, 100 Nev. 471, 472, 686 P.2d 247, 248 (1984)).

S.D., the declarant, testified at trial and explained that the first time she told A.D. about Dreyfuss's sexual abuse was while the two

---

[4]Dreyfuss contends that A.D.'s testimony regarding the assault and Reed's testimony concerning S.D.'s complaint that Dreyfuss threw dinner against the wall constituted inadmissible hearsay. We have reviewed the record with respect to A.D.'s testimony and determine that the State's question did not call for hearsay, nor did A.D.'s answer reference any out of court statement; therefore, Dreyfuss's assertion is without merit. Further, as to Reed's testimony, Dreyfuss did not preserve the issue for appellate review, and we conclude that he has failed to demonstrate how the evidence caused him prejudice or resulted in a miscarriage of justice. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

were running as part of the exercise regimen. S.D. was subject to cross-examination concerning this statement, as Dreyfuss asked her on three separate occasions whether she had told A.D. about Dreyfuss's behavior. A.D.'s statement was consistent with S.D.'s testimony at trial because he, too, testified that he first learned of Dreyfuss's sexual abuse from S.D. while the two were running. Finally, A.D.'s testimony concerning S.D.'s statement was offered to rebut an express or implied charge of recent fabrication. Dreyfuss's defense and theme throughout the trial was that S.D. had fabricated her allegations so that she could return to live with her mother. Dreyfuss argued this defense in opening arguments and questioned S.D. about it on cross-examination. Dreyfuss explicitly argued that S.D. fabricated her story and therefore the State properly offered A.D.'s testimony regarding S.D.'s statement to rebut Dreyfuss's charge of fabrication.

Moreover, we disagree with Dreyfuss's contention that S.D. had a motive to fabricate at the time she made the statement to A.D. S.D. moved in with Dreyfuss in August of 2006, and she testified that she told A.D. about Dreyfuss's sexual abuse in December of 2006. Although Dreyfuss maintained that S.D.'s motive to fabricate was her desire to return to live with her mother, the record is devoid of any evidence that suggests that this motive arose during this short time frame. Because the record does not support Dreyfuss's position and A.D.'s testimony qualifies as a prior consistent statement, we conclude that the district court did not abuse its discretion in admitting the testimony.

Jury instructions

Dreyfuss argues that the district court erred when it failed to give a jury instruction offered by the defense. He also contends that the district court erred in giving Jury Instruction Nos. 4, 18, 20, and 22.

We review a district court's decision as to jury instructions for an abuse of discretion or judicial error. Grey v. State, 124 Nev. 110, 122, 178 P.3d 154, 163 (2008). However, we employ plain error review when an error has not been preserved for appeal. Green, 119 Nev. at 545, 80 P.3d at 95. Dreyfuss preserved for appeal his argument pertaining to his proffered jury instruction. He did not, however, object to Jury Instruction Nos. 4, 18, 20, and 22. Therefore, we review the district court's decision regarding Dreyfuss's proposed jury instruction for an abuse of discretion but review Jury Instruction Nos. 4, 18, 20, and 22 for plain error.

Dreyfuss's proposed jury instruction

Dreyfuss asserts that the district court erred when it refused to use a modified version of California Jury Instructions, Criminal (CALJIC) 2.40, substituting "defendant's good character" for "untruthful character of the alleged victim."

CALJIC 2.40 provides that evidence of a defendant's good character may be sufficient to generate reasonable doubt as to the charged crimes. Dreyfuss's proposed jury instruction modified CALJIC so as to provide that:

> Evidence has been received for the purpose of showing untruthful character of the alleged victim. Untruthful character when considered in connection with other evidence in the case may generate a reasonable doubt sufficient to justify you in finding the defendant not guilty of the charges.

The district court correctly found that the proposed jury instruction was not an accurate statement of the law and that the theory of defense issue was adequately covered by other instructions. Specifically, it correctly determined that Dreyfuss's instruction was based on a California jury instruction that dealt with the good character of the

defendant, not the character of the victim. The district court also correctly noted that Dreyfuss's instruction did not accurately reflect what is set forth in NRS 50.085, Nevada's statutory provision on evidence of character. Finally, other instructions adequately instructed the jury on the credibility of witnesses. We conclude that because Dreyfuss's instruction misstated the law and was adequately covered by other jury instructions, the district court did not abuse its discretion in failing to provide the jury with Dreyfuss's proposed instruction.

Jury Instruction No. 4

Dreyfuss contends that Jury Instruction No. 4 lessened the State's burden of proof because it contained the word "until" instead of "unless." Jury Instruction No. 4 provided, in pertinent part: "The Defendant is presumed innocent until the contrary is proved." We have held that the use of the word "until" tracks the statutory language of NRS 175.191 and does not "nullif[y] the presumption of innocence by implying that [a defendant's] guilt [will] eventually be proven beyond a reasonable doubt." Blake v. State, 121 Nev. 779, 799, 121 P.3d 567, 580 (2005). Therefore, the district court did not commit plain error in providing the jury with Instruction No. 4.

Jury Instruction No. 18

Dreyfuss argues that Jury Instruction No. 18 unfairly focuses the jury's attention on and highlights a single witness's testimony. Jury Instruction No. 18 provided that "[t]here is no requirement that the testimony of an alleged victim of sexual assault be corroborated, and her testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty." Recently, in Gaxiola v. State, 121 Nev. 638, 649, 119 P.3d 1225, 1233 (2005), we affirmed a similar instruction as a correct statement of the law. We also held that "the

instruction does not unduly focus the jury's attention on the victim's testimony." Id. at 649-50, 119 P.3d at 1233. We conclude that the district court did not commit plain error in providing Jury Instruction No. 18.

Jury Instruction No. 20

Dreyfuss asserts that Jury Instruction No. 20 misstates the law. Jury Instruction No. 20 stated that "[w]here multiple sexual acts occur as part of a single criminal encounter, each separate and distinct act is a separate offense." It accurately stated the law. We have held that the facts of a case may support convictions on separate charges "'even though the acts were the result of a single encounter and all occurred within a relatively short time.'" Crowley v. State, 120 Nev. 30, 33, 83 P.3d 282, 285 (2004) (quoting Wright v. State, 106 Nev. 647, 650, 799 P.2d 548, 549-50 (1990)). Further, distinct sexual acts that are part of a single encounter may be charged as separate counts. Townsend v. State, 103 Nev. 113, 120-21, 734 P.2d 705, 710 (1987). Jury Instruction No. 20 correctly stated that law and therefore the district court did not commit plain error in providing the instruction.

Jury Instruction No. 22

Dreyfuss argues that Jury Instruction No. 22 misstates the law. Specifically, he argues that the instruction inaccurately defines voluntariness. Jury Instruction No. 22 provided, in pertinent part, that "[a]n involuntary statement is one made under circumstances in which the accused clearly had no opportunity to exercise a free and unconstrained will." It is an accurate statement of the law, even though it did not quote the definition of voluntariness adopted in Blackburn v. Alabama, 361 U.S. 199, 208 (1960), that a confession is involuntary if it is not the product of a "rational intellect and a free will." Both definitions portray the same meaning, namely, that a confession is voluntary only if it is the product of

the defendant's free will. We conclude that the district court did not commit plain error in providing the jury with Instruction No. 22.[5]

Redundancy

Dreyfuss contends that his two lewdness convictions are redundant because his two acts were part of a single encounter.[6]

"[A] claim that convictions are redundant stems from the legislation itself and the conclusion that it was not the legislative intent to separately punish multiple acts that occur close in time and make up one course of criminal conduct." Wilson v. State, 121 Nev. 345, 355, 114 P.3d 285, 292 (2005). Convictions are redundant "when the facts forming the basis for two crimes overlap, when the statutory language indicates one rather than multiple criminal violations was contemplated, and when legislative history shows that an ambiguous statute was intended to assess one punishment." Id. at 355-56, 114 P.3d at 292-93 (citations omitted).

NRS 201.230(1) defines lewdness, in relevant part, as the willful and lewd commission of

---

[5]We note Dreyfuss's argument with respect to the district court's use of the word "victim" in the jury instructions and the State's use of the word in closing arguments. Dreyfuss, however, failed to object to the use of the word "victim" in the jury instructions and during closing arguments. We have reviewed this issue and determine that Dreyfuss has failed to demonstrate that his substantial rights were affected. Green, 119 Nev. at 545, 80 P.3d at 95.

[6]Dreyfuss argues redundancy with reference to double jeopardy principles. Redundancy and double jeopardy are separate concepts. See Wilson, 121 Nev. at 355-60, 114 P.3d at 292-96. Dreyfuss's argument is properly construed as one for redundancy.

> 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.

The clear import of NRS 201.230(1) is to criminalize any lewd or lascivious act, except for acts of sexual assault, upon or with the body of a child under the age of 14 years, with the intent of arousing the sexual desires of that person or of that child. The Legislature's use of the phrase "any lewd or lascivious act" clearly demonstrates its intent to separately punish multiple acts that occur during the course of criminal conduct. NRS 201.230(1). Dreyfuss was convicted of two lewd acts. S.D. testified that when Dreyfuss entered her bedroom, he began fondling her breasts. She further testified that he then began to lick and suck on her breasts. She also testified that Dreyfuss then fondled and digitally penetrated her vagina. Dreyfuss's act of licking S.D.'s breasts and his act of fondling her vagina were distinct acts committed upon separate parts of her body with the intent to arouse his or S.D.'s sexual desires. The two convictions punish two separate acts. We conclude that Dreyfuss's lewdness convictions are not redundant.

Sufficiency of evidence

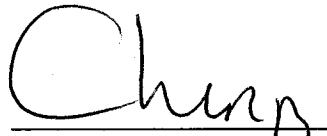
Dreyfuss argues that the State failed to present sufficient evidence to support his two lewdness convictions.

In reviewing whether there is sufficient evidence to support a jury's verdict, this court determines "'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)

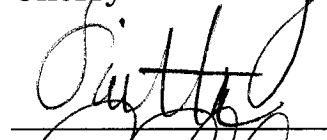
(quoting Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998)).

We determine that the State presented sufficient evidence to support Dreyfuss's convictions; specifically: (1) S.D.'s testimony that Dreyfuss fondled and licked her breasts and digitally penetrated her vagina and anus with his fingers, (2) Kristina Paulette's testimony that Dreyfuss's DNA was found on S.D.'s breast, and (3) Dreyfuss's statement to detectives that he "possibly" fondled and licked S.D.'s breasts and digitally penetrated her vagina.[7] Accordingly, for the foregoing reasons, we

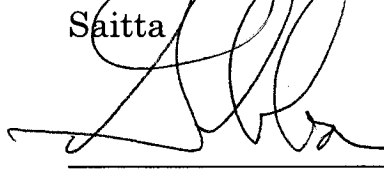
ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry



_____, J.
Saitta



_____, J.
Gibbons

cc: Hon. David B. Barker, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

---

[7]We have reviewed Dreyfuss's remaining contentions and conclude that they are without merit.