IN THE SUPREME COURT OF THE STATE OF NEVADA

ARTURO ENRIQUE ACOSTA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53933

FILED

FEB 03 2011

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of 5 counts of sexual assault with a minor under the age of 14 and 7 counts of lewdness with a child under the age of 14. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

The district court sentenced appellant Arturo Enrique Acosta to numerous sentences of life imprisonment. Acosta appeals his convictions on multiple grounds: (1) insufficient evidence to support a guilty verdict, (2) improper invocation of the Fifth Amendment by a witness in violation of Acosta's Sixth Amendment right to confront that witness, (3) improper admission of bad acts evidence of domestic violence and lack of employment, (4) improper admission of witness testimony regarding other bad acts, and (5) violation of the Double Jeopardy Clause for his convictions on two of the lewdness convictions. We conclude that Acosta's double jeopardy argument has merit, but his other contentions are without merit. Thus, we affirm the district court's judgment of conviction in part, reverse in part, and remand this matter to the district court for further proceedings consistent with this order.

Sufficiency of the evidence

Acosta argues that there is insufficient evidence to support a guilty jury verdict on all counts of lewdness with a child under the age of

14 and sexual assault with a minor under age 14. In reviewing challenges to the sufficiency of the evidence on appeal, we ask ""'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) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984))). It is the jury's function to assess the weight of the evidence and credibility of the witnesses. Id. at 202-03, 163 P.3d at 414. In sexual assault cases, the victim's testimony alone will suffice to uphold a conviction, as long as the victim testifies with some particularity. Id. at 203, 163 P.3d at 414. When the victim is a child, the child does not have to "'specify exact numbers of incidents'" of lewdness or assault, but "'there must be some reliable indicia that the number of acts charged actually occurred.'" Id. (quoting LaPierre v. State, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992)).

Here, Acosta argues that there was insufficient evidence because the child victim's testimony was inconsistent and therefore not credible, and the prosecution elicited testimony from the child victim through the use of leading questions.[1]

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[1]Although Acosta argues on appeal that the child victim's credibility is questionable because the prosecution elicited much of her testimony through leading questions, he cites to no specific instances where this occurred. Moreover, our review of the record reveals that while Acosta made approximately four objections to leading questions during the victim's direct examination, the trial court overruled three of the four objections, and Acosta does not directly challenge those rulings on appeal. Thus, we conclude that Acosta' argument on this issue is without merit.

A review of the record reveals that the child victim's testimony as to each count evinced a specific instance of the relevant charge that occurred when victim was under the age of 14. Because this testimony provided a basis upon which a rational trier of fact could have found the elements of each of the crimes of which Acosta was convicted beyond a reasonable doubt, we conclude that sufficient evidence supports his conviction. Additionally, with respect to the sexual assault charged in count 8, we are satisfied that the district court's use of a monitor to convey the victim's written responses to specific questions about how Acosta sexually penetrated her was proper.

Balancing the Fifth Amendment and Sixth Amendment

At trial, the child victim's brother, N.B., testified regarding Acosta's abusive behavior and that Acosta made him watch pornographic movies. However, N.B. opted to invoke his Fifth Amendment privilege regarding an alleged sexual encounter with the victim. Acosta argues that this violated his Sixth Amendment right to confront the witness because he could not confront N.B. about the alleged encounter, and as such, the district court should have excluded N.B. from testifying.

The Fifth Amendment gives a witness the right to refuse to answer questions when the witness's answers will incriminate him. Jones v. State, 108 Nev. 651, 657, 837 P.2d 1349, 1352 (1992). The Sixth Amendment's Confrontation Clause allows the accused to confront all witnesses against him. Chavez v. State, 125 Nev. ___, ___, 213 P.3d 476, 483 (2009). However, this court has held that a witness's refusal to testify based on his Fifth Amendment right against self-incrimination generally outweighs the defendant's right to confront witnesses on the question for which the witness invokes the privilege. Palmer v. State, 112 Nev. 763, 766, 920 P.2d 112, 113 (1996); see also Kastigar v. United States, 406 U.S.

441, 444-45 (1972) (the Fifth Amendment privilege against self-incrimination is a limitation on the right to compel testimony under the Sixth Amendment).

Here, the district court learned that N.B. might invoke his Fifth Amendment privilege regarding his alleged sexual encounter with the victim during a hearing outside the presence of the jury, and the court instructed the parties that no one could ask N.B. about the encounter if he did invoke the privilege. Defense counsel objected to this arrangement and argued that N.B should not be allowed to testify at all.

We disagree with Acosta's argument that his inability to cross-examine N.B. about an alleged sexual encounter that occurred between N.B. and the child victim violated his Sixth Amendment rights. The State never addressed this subject with N.B. on direct examination, and the jury never heard any testimony from N.B. regarding his alleged sexual activity with his sister. However, N.B. did testify to other relevant facts, and Acosta had the opportunity to cross-examine him regarding that testimony. Thus, the district court properly balanced N.B.'s Fifth Amendment rights with Acosta's Sixth Amendment rights by allowing N.B. to testify on all issues except for his alleged sexual encounter with the child victim. As such, we conclude that the district court did not err by allowing N.B. to testify.

Admissibility of prior bad acts

At trial, the State introduced evidence that Acosta committed acts of domestic violence against the child victim, her mother, and N.B. The State also introduced evidence that Acosta was unemployed during the time he sexually assaulted the child victim. Acosta argues on appeal that evidence of domestic violence and unemployment are inadmissible character evidence used to prove conformity with bad character traits.

Acosta further argues that the domestic violence evidence was improper because the State used it to prove that he acted in conformity with his violent disposition, and that that the State introduced evidence of his unemployment to show that he was "shiftless or lazy or uninterested in supporting his family." Acosta also specifically challenges the admissibility of Tania Davis's testimony regarding an apparent instance of domestic violence. For the reasons discussed below, we conclude Acosta's claims lack merit.

Standard of review

To determine whether a bad act is admissible, the trial court must decide, outside the presence of the jury, whether: "(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." Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). Great deference is given to the trial court's decision to admit or exclude evidence of prior bad acts, and we will not overturn its decision "absent manifest error." Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002).

Domestic violence and unemployment evidence

Here, the district court held two hearings to determine the admissibility of evidence that Acosta committed acts of domestic violence and that he was unemployed. During the first hearing, the district court determined that "domestic violence in a household is relevant to explain why [the] child would not report it, which is more a res gestae issue," and that proof of Acosta's unemployment was relevant to prove that Acosta had an opportunity to commit the crimes for which he was charged. The district court concluded that the evidence was "relevant and admissible,"

but that the court would conduct an evidentiary hearing to determine if the prior bad acts were proven by clear and convincing evidence.

At the evidentiary hearing, the child victim, her mother, and N.B. testified as to Acosta's acts of domestic violence. The victim's mother also testified briefly about Acosta's employment history. Following the evidentiary hearing, the district court concluded that the acts were proven by clear and convincing evidence and therefore admissible. The district court also found that the evidence of domestic violence was probative as to why the child victim waited so long to come forward regarding the sexual abuse and that Acosta's lack of employment was probative of his opportunity to commit the sexual assault and lewdness crimes for which he was charged. Thus, we conclude that the three prongs of the Tinch test are satisfied and it was not manifest error for the district court to admit the domestic violence and unemployment evidence.

Tania Davis's testimony

Acosta further contends that the district court erred in allowing the testimony of Tania Davis, a former neighbor, regarding a slap she heard over the telephone. Acosta maintains that Davis's evidence is insufficient to meet the "clear and convincing" standard required by Petrocelli v. State, 101 Nev. 46, 51-52, 692 P.2d 503, 507-08 (1985), superseded by statute on other grounds as stated in Thomas v. State, 120 Nev. 37, 44-45, 83 P.3d 818, 823 (2004). He further argues that this testimony was prejudicial. We disagree. This court has previously held that "clear and convincing proof of collateral acts can be established by an offer of proof outside the presence of the jury combined with the quality of the evidence actually presented to the jury." Salgado v. State, 114 Nev. 1039, 1043, 968 P.2d 324, 327 (1998).

Here, the district court conducted an evidentiary hearing outside the presence of the jury and heard testimony from Davis. She testified as to her knowledge of the child victim's family and, more specifically, to her familiarity with Acosta's voice stemming from several telephone calls she had with him. Based on this familiarity, the district court allowed Davis to testify at trial regarding a voicemail message she received where she allegedly heard Acosta slap a member of the child victim's family. We conclude that Acosta was not unduly prejudiced by Davis's testimony, and it was not manifest error for the district court to permit Davis to testify.

Double jeopardy

The Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and Article 1, Section 8 of the Nevada Constitution prohibit "'multiple punishments for the same offense.'" Gordon v. District Court, 112 Nev. 216, 220, 913 P.2d 240, 243 (1996) (quoting United States v. Halper, 490 U.S 435, 440 (1989), abrogated on other grounds by Hudson v. U.S., 522 U.S. 93, 95-96 (1997)). Double jeopardy rights are implicated when the elements of one offense are wholly included within the elements of the other offense. See Estes v. State, 122 Nev. 1123, 1143, 146 P.3d 1114, 1127 (2006). The State concedes that counts 7 and 10 violate double jeopardy because count 7 (lewdness with a child under the age of 14) was an alternative to count 6 (sexual assault with a minor under the age of 14) and, identically, count 10 was an alternative to count 8. Therefore, Acosta's convictions on counts 7 and 10 must be reversed and the matter remanded to the district court with instructions to vacate Acosta's convictions on counts 7 and 10 and resentence him accordingly.

Therefore, for the reasons stated above, we

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

Douglas, C.J.

Hardesty, J.

Pickering, J.

cc: Hon. Douglas W. Herndon, District Judge
Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender
Eighth District Court Clerk