IN THE SUPREME COURT OF THE STATE OF NEVADA

JOEY LARRY HANSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54232

FILED

FEB 09 2011

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

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of fifteen counts of lewdness with a minor under the age of fourteen and nine counts of sexual assault of a minor under the age of fourteen. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Jurisdiction

Hanson argues that the district court did not have jurisdiction to convict him because the State filed the information in the district court while the justice court retained jurisdiction over his case. We disagree. As the justice court found the charges supported by probable cause on June 16, 2008, the State could properly file the information in the district court on June 24, 2008. See NRS 173.035(1)(a) (providing that an information may be filed after justice court binds over accused to "appear at the court having jurisdiction"); Koza v. Sheriff, 93 Nev. 6, 8, 559 P.2d 394, 395 (1977) (providing that prosecuting attorney could not file information in absence of probable cause finding by magistrate).

Sufficiency of the information

Hanson argues that the information was insufficient to permit him to present a defense and contends that the general nature of the charges in the information permitted the State to amend it to his detriment. We disagree. First, it is not apparent that the original information prejudiced Hanson. See Laney v. State, 86 Nev. 173, 178, 466 P.2d 666, 669 (1970) (providing that a verdict "cures mere technical defects unless it is apparent that they have resulted in prejudice to the defendant"). Time is not an essential element of the charges of sexual assault of a minor and lewdness with a minor, see NRS 200.366; NRS 201.230; Martinez v. State, 77 Nev. 184, 189, 360 P.2d 836, 838 (1961) (holding that time is not an element of the offense of rape), and the State was not required to allege an exact date, see Cunningham v. State, 100 Nev. 396, 400, 683 P.2d 500, 502 (1984). Further, the victim testified at the preliminary hearing to multiple instances of lewdness and sexual assault occurring each year between 2001 and 2005. Second, as the amendments did not allege additional offenses but merely altered the time period during which some of the charges were alleged to have occurred to conform to the evidence admitted at trial, Hanson's substantial rights were not prejudiced by the amendment. See Shannon v. State, 105 Nev. 782, 785, 783 P.2d 942, 944 (1989); see also NRS 173.095(1).

Sufficiency of the evidence

Hanson argues that insufficient evidence was produced at trial to support the charges against him. We disagree. The victim testified that Hanson repeatedly penetrated her genitalia with his finger; fondled her chest, genitalia and buttocks; made her penetrate herself; and forced her to rub his penis several times over the course of several years. This

evidence alone was sufficient to support the convictions. See Mejia v. State, 122 Nev. 487, 493 n.15, 134 P.3d 722, 725 n.15 (2006) ("[T]his court has 'repeatedly held that the testimony of a sexual assault victim alone is sufficient to uphold a conviction' so long as the victim testifies with 'some particularity regarding the incident.'" (quoting LaPierre v. State, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992))). In addition, Hanson admitted to detectives that he had fondled the victim's genital area and made her fondle his penis. We conclude that this evidence was sufficient for a rational juror to find beyond a reasonable doubt that Hanson was guilty of lewdness with a child under the age of fourteen and sexual assault of a child under the age of fourteen. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); NRS 201.230(1); NRS 200.366(1), (3)(c).

Prior bad acts

Hanson argues that the district court erred in admitting evidence of uncharged conduct and failing to give a limiting instruction following its admission. We conclude that the district court did not plainly err in admitting the evidence. See Mclellan v. State, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008) (providing that this court reviews admission of prior bad act evidence for plain error where defendant fails to object at trial). During the trial, several witness testified that Hanson was physically abusive toward the victim, her siblings, and their mother. While some of this testimony was invited by the defense's cross-examination of a witness, see State v. Gomes, 112 Nev. 1473, 1480, 930 P.2d 701, 706 (1996) (providing that error in admitting evidence was not reversible where defense invited the error), the district court erred in admitting the remaining evidence without conducting a hearing pursuant

to Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985). However, as the erroneously admitted evidence did not significantly differ from the invited evidence and the evidence of the prior uncharged conduct paled in comparison to the acts which Hanson was charged with, he did not demonstrate that the admission of the evidence affected his substantial rights. See Diomampo v. State, 124 Nev. 414, 430, 185 P.3d 1031, 1041 (2008). Further, as evidence against Hanson was substantial and the district court gave limiting instructions during each witnesses' testimony and in the final instructions, he failed to demonstrate that the failure to give a cautionary instruction after the introduction of each instance of prior uncharged conduct affected his substantial rights. See id.; see also Leonard v. State, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) (providing that this court presumes that the jury follows the district court's instructions).

Jury instruction

Hanson argues that the district court erred in refusing his proposed changes to the corroboration instruction and including lewdness with a minor in the instruction. We disagree. This court has upheld jury instructions which attach the no-corroboration rule to "sexual offenses," including the offenses of sexual assault and lewdness. Gaxiola v. State, 121 Nev. 638, 649-50, 119 P.3d 1225, 1233 (2005). As the given instruction was legally correct, the district court did not abuse its discretion in refusing to give Hanson's proposed instruction. See Grey v. State, 124 Nev. 110, 122, 178 P.3d 154, 163 (2008) (reviewing a district court's decision regarding jury instructions for abuse of discretion).

Prosecutorial misconduct

Hanson argues that the State engaged in prosecutorial misconduct during rebuttal closing arguments.

First, Hanson argues that the prosecutor's comment that the State had proven some instances of sexual abuse that were not charged in the information and had essentially permitted Hanson "free crimes" lowered the State's burden of proof with regard to the charged crimes. The prosecutor's argument was improper and the district court erred in overruling the objection to it. See U.S. v. Weatherspoon, 410 F.3d 1142, 1153 (9th Cir. 2005) (providing that it is improper for a prosecutor to lead the jury to consider "issues 'broader than the guilt or innocence of the accused under the controlling law'" (quoting ABA Standards for Crim. Justice, 3-5.8(d) (2d ed. 1980))). Nevertheless, considering the evidence of Hanson's guilt, which included the victim's testimony and his admission to some of the charged conduct, we are convinced beyond a reasonable doubt that this error did not contribute to the verdict and is therefore harmless. See Valdez v. State, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008) (citing Chapman v. California, 386 U.S. 18, 24 (1967)).

Second, Hanson argues that the prosecutor's reference to uncharged prior physical abuse lowered the State's burden of proof with regard to the charged crimes. Hanson did not did not object to the prosecutor's statements concerning the reference to uncharged conduct, and we conclude he failed to demonstrate plain error. See id. at 1190, 196 P.3d at 477.

Third, Hanson argues that the prosecutor's comments concerning his failure to produce credit reports, police reports, and request a polygraph examination shifted the burden of proof. We disagree. The comments by the State responded to arguments put forth in the defense closing. See Emil v. State, 105 Nev. 858, 868, 784 P.2d 956, 962 (1989)

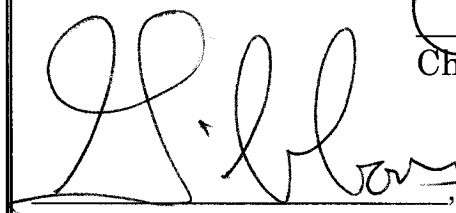
(providing that comments invited by defense argument do not amount to prosecutorial misconduct).

Fourth, Hanson argues that the prosecutor's assertion that Hanson had read the victim's statement suggested that he tailored his testimony and was untruthful. We disagree. Counsel's remark that Hanson had read the victim's statement was an accurate summation of the evidence. Further, in the context in which the statement was made, it was part of a proper argument highlighting the similarities between the statements given by the victim and Hanson. See Miller v. State, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005) (providing that prosecutor's comments must be viewed in the context in which they are made).

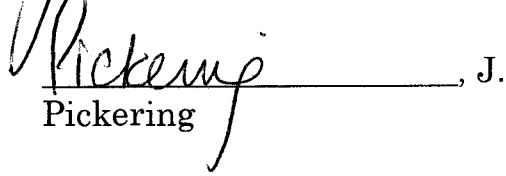
Although we conclude that Hanson is not entitled to any relief, our review of the record on appeal reveals an error in the judgment of conviction: the judgment of conviction indicates that the district court sentenced Hanson to life in prison with the possibility of parole after ten years for Count 26 of the amended information despite the fact that the jury verdict indicates that he was acquitted of the charge. Accordingly, we

ORDER the judgment of conviction AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.

_____, J.
Cherry



_____, J.
Gibbons



_____, J.
Pickering

cc: Hon. Valerie Adair, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk