IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL DUWAIN WILSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54814

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of eight counts of lewdness with a child under the age of 14 years and one count of unlawful contact with a child. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Appellant Michael Wilson was convicted of eight counts of lewdness with a minor under the age of 14 years, and one count of unlawful contact with a child. On appeal, Wilson raises numerous arguments, only one of which we address in detail in this order.[1]

Wilson argues that the State presented insufficient evidence to support several of the convictions for lewdness with a child under the age of 14 years. In particular, he claims that the State failed to prove that

[1]Wilson argues that: (1) the district court erred when it denied his motion for a judgment of acquittal or new trial because it applied the wrong standard of review, (2) his conviction violates the Double Jeopardy Clause, (3) A.S. and C.S. were not competent to testify, (4) the district court erred when it provided incorrect jury instructions, (5) the State committed prosecutorial misconduct during closing arguments, and (6) the district court erred when it denied his pretrial motions challenging the court's jurisdiction and seeking severance. After thorough review, we conclude that these contentions are without merit.

the acts were lewd or lascivious because the conduct was not sexual and a nonsexual act is not a "lewd or lascivious" act under NRS 201.230.

Based on the evidence presented in this case, we conclude that a rational jury could find beyond a reasonable doubt that Wilson's actions were lewd and lascivious with the necessary sexual intent. We therefore affirm the judgment of conviction.

Discussion

Wilson argues that the State presented insufficient evidence because it failed to prove that his acts with the children were sexual, and nonsexual acts cannot be considered lewd or lascivious for purposes of NRS 201.230. Although we agree that the statute requires a lewd or lascivious act and that a lewd act must be accompanied by the necessary sexual intent, we conclude that a rational juror could find beyond a reasonable doubt that Wilson's conduct was lewd or lascivious, and he acted with the necessary sexual intent.

When reviewing a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the prosecution and determine whether any rational juror could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). It is for the jury to assess the witnesses' credibility and determine the weight to give their testimony, and the jury's verdict will not be disturbed on appeal where substantial evidence supports the verdict. McNair, 108 Nev. at 56, 825 P.2d at 573; Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Wilson's sufficiency-of-the-evidence challenge raises two questions: (1) whether NRS 201.230 requires the prosecution to prove both

sexual motivation and that a lewd or lascivious act occurred, and (2) what constitutes a lewd or lascivious act. We address these questions in turn.

Statutory interpretation is a question of law that we review de novo. Sims v. Dist. Ct., 125 Nev. 126, 129-30, 206 P.3d 980, 982 (2009). When a statute is clear and unambiguous, this court gives effect to the plain and ordinary meaning of the words and does not resort to the rules of construction. Seput v. Lacayo, 122 Nev. 499, 502, 134 P.3d 733, 735 (2006), abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008). When interpreting statutes, the primary consideration is the Legislature's intent. Cleghorn v. Hess, 109 Nev. 544, 548, 853 P.2d 1260, 1262 (1993). This court, however, will not render any part of the statute meaningless and will not read the statute's language so as to produce absurd or unreasonable results. Leven v. Frey, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007).

NRS 201.230(1) defines the crime of lewdness with a minor under 14 years:

> A person who willfully and lewdly commits 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, is guilty of lewdness with a child.

(Emphasis added.) The material elements of the crime of lewdness with a minor are (1) a lewd or lascivious act, (2) upon or with the child's body or

any part of the child's body,[2] (3) the child's age, and (4) the intent to arouse, appeal to, or gratify, the lust or passion of the accused or the child. NRS 201.230(1); Gay v. Sheriff, 89 Nev. 118, 119 n.1, 508 P.2d 1, 2 n.1 (1973); see also 43 C.J.S. Infants § 120 (2004).

The statute plainly and unambiguously prohibits only lewd or lascivious acts with a minor under the age of 14 years. A contrary reading of the statute would render the modifier "lewd or lascivious" meaningless so that any act with the requisite sexual intent would be criminal. That is simply not the social harm that NRS 201.230 seeks to prohibit. If it were, the Legislature easily could have proscribed that any act upon or with the body of a child with sexual intent is the crime of lewdness with a minor. It did not do so. In Berry v. State, 125 Nev. 265, 282, 212 P.3d 1085, 1097 (2009), abrogated on other grounds by State v. Castaneda, 126 Nev. ___, ___ n.1, 245 P.3d 550, 553 n.1 (2010), we concluded that the term "lewd" was sufficiently definite to give notice of the prohibited conduct such that it was not unconstitutionally vague. Berry, 125 Nev. at 282, 212 P.3d at 1097; see also Summers v. Sheriff, 90 Nev. 180, 521 P.2d 1228 (1974). We noted that

> [m]odern authorities define "lewd" as pertaining to sexual conduct that is "[o]bscene or indecent; tending to moral impurity or wantonness," Black's

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[2]This court has held that the statute does not require that the accused have physical contact with the child; instead, "[a]n act committed 'with' the minor's body indicates that the minor's body is the object of attention," and thus, "the perpetrator need only cause the child to perform a lewd act upon him or herself to satisfy the elements set forth in the statute." State v. Catanio, 120 Nev. 1030, 1033-34, 102 P.3d 588, 591 (2004).

> Law Dictionary 927 (8th ed. 2004), "evil, wicked" or "sexually unchaste or licentious," Merriam-Webster's Collegiate Dictionary 715 (11th ed. 2003), and "[p]reoccupied with sex and sexual desire; lustful," The American Heritage Dictionary of the English Language 1035 (3d ed. 1996).

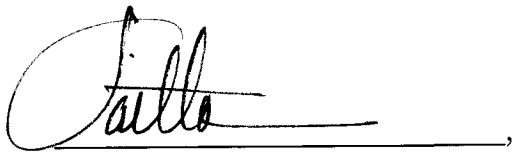
Berry, 125 Nev. at 281, 212 P.3d at 1096 (alterations in original).

We conclude that the State presented sufficient evidence that Wilson's conduct was lewd or lascivious, and was sexually motivated as required by NRS 201.230(1). The charges against Wilson involved two young girls who are sisters, A.S. and C.S. Wilson lived next door to the girls with his girlfriend Tonja, her teenage daughter J.F., and other family members. From February 2007 to early 2008, J.F. and Tonja babysat A.S. and C.S. while their mother worked the night shift as a cabdriver. Occasionally, the two girls would sleep at Wilson's home while their mother worked. A.S. and C.S. were 8 and 10 years old, respectively, when this childcare arrangement began.

During that time, Wilson at various times touched A.S.'s genitals, breasts, buttocks, and the "roof" of her buttocks. Wilson also showed her pornography on his cell phone and on the walls of his garage, though A.S. explained that he did not touch her during those incidents. Similarly, Wilson touched C.S.'s buttocks, clavicle area, sides of her breasts, and thighs. He also touched her on her shoulders, lower back, and sides of her body while showing her pornography. Additionally, he told both girls that he would hurt their mother if they told anyone about the touchings. Based on this evidence, we conclude that a rational juror could find beyond a reasonable doubt that Wilson committed eight counts of lewdness with a minor under the age of 14 years.

Therefore, we affirm the district court's judgment of conviction.[3]

It is so ORDERED.



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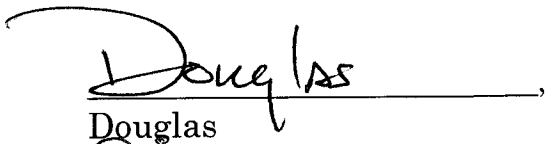

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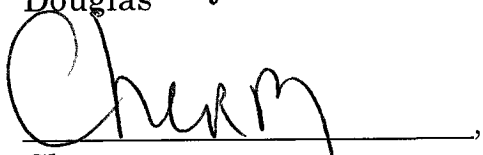

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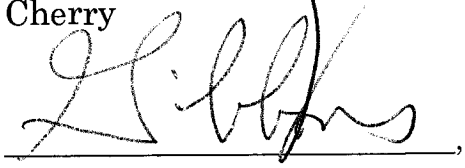

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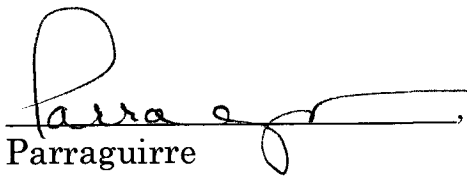
Gibbons



_____, J.
Parraguirre

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[3]We note that the district court did not use the correct standard in deciding the motion for a new trial. Wilson sought a new trial based on conflicting evidence. The standard enunciated in Evans v. State, 112 Nev. 1172, 926 P.2d 265 (1996), requires the district court to conduct an independent evaluation of the conflicting evidence. Here, the district court concluded that it must defer to the jury rather than independently evaluate and resolve any conflicting evidence for purposes of the motion for a new trial. Though the district court was not obligated to order a new trial even if it disagreed with the jury, it may not abrogate its duty to independently evaluate the evidence and resolve conflicting evidence of guilt by deferring to the jury. We nevertheless conclude that the error was harmless beyond a reasonable doubt.

stricken per order filed 5-9-12

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

PICKERING, J., with whom HARDESTY, J. agrees, concurring:

While I concur in the result, I respectfully disagree with the majority's statutory analysis, in particular, its statements that NRS 201.230(1) "plainly and unambiguously prohibits only lewd or lascivious acts with a minor under the age of 14 years"; that "[a] contrary reading of the statute would render the modifier 'lewd or lascivious' meaningless so that any act with the requisite sexual intent would be criminal [which] is simply not the social harm that NRS 201.230 seeks to prohibit"; and that "the Legislature easily could have proscribed . . . any act upon or with the body of a child with sexual intent [but] did not do so."

Nevada's lewdness with a child statute is almost identical to California's. Compare NRS 201.230(1) with Cal. Penal Code § 288. Although it does not cite the decision, the majority's element-based statutory analysis appears to be drawn from People v. Wallace, 14 Cal. Rptr. 2d 67 (Ct. App. 1992), which a unanimous California Supreme Court overruled in People v. Martinez, 903 P.2d 1037, 1045-46 (Cal. 1995) (rejecting Wallace's statutory analysis as "hyperliteral" and unsound). Martinez explains why we should not introduce the Wallace formulation into Nevada law, even in an unpublished disposition.

The existence of a "lewd or lascivious act" cannot be determined separate and apart from the perpetrator's intent:

> It is common knowledge that children are routinely cuddled, disrobed, stroked, examined, and, groomed as part of a normal and healthy upbringing. On the other hand, any of these intimate acts may also be undertaken for the purpose of sexual arousal. Thus, depending upon the actor's motivation, innocent or sexual, such behavior may fall within or without the protective

> purposes of [the lewdness with a child statute]. As the vast majority of courts have long recognized, the only way to determine whether a particular touching is permitted or prohibited is by reference to the actor's intent as inferred from all the circumstances. . . . [A]ny other construction could exempt a potentially broad range of sexually motivated and harmful contact from the statute's reach. In light of the statutory purpose, we cannot conceive that the Legislature intended such a result.

Id. at 1046 (emphasis added). Parsing NRS 201.230(1) in such a way as to require an inherently lewd act, separate and apart from the sexual intent that motivates the act, "is not supported by [the statute's] language, context, purpose, and long-settled construction." It also runs counter "to the overwhelming weight of authority," Martinez, 903 P.2d at 1041, including prior Nevada case law. See State v. Catanio, 120 Nev. 1030, 102 P.3d 588 (2004) (cataloguing the many mainstream Nevada cases in this area and citing with approval People v. Austin, 168 Cal. Rptr. 401 (Ct. App. 1980), a case Wallace disapproved, 14 Cal. Rptr. 2d at 71-74, but Martinez specifically endorsed, Martinez, 903 P.2d at 1044 in overruling Wallace).

Although old enough to be called "venerable," Martinez, 903 P.2d at 1041, the wording used in NRS 201.230(1) does not support the "plain meaning" the majority ascribes to it. By its terms, the statute applies to any contact "upon or with the [victim's] body, or any part or member thereof," so long as the requisite sexual motivation and intent are shown. Martinez, 903 P.2d at 1041 (alteration in original) (emphasis added) (citations and quotations omitted). "When contact with or penetration of a specific body part or cavity is required, or when use of a particular appendage or instrument is necessary to commit the offense,

this fact has been made eminently clear" by the Legislature. Id. Thus, "[w]e can only assume that the absence of similar language in [the lewdness with a child statute] was deliberate, and that the statute was intended to include sexually motivated conduct not made criminal elsewhere in the scheme." Id. See also NRS 201.230(1) (excluding sexual assault from the crime of lewdness with a child; NRS 200.366 defines sexual assault in terms of "sexual penetration," which NRS 200.364(4) in turn defines in terms of intrusion into "the genital or anal openings of the body of another").

"The Legislature's decision to cast a prohibited lewd act in such general terms is consistent with the basic purpose of the statute," which "recognizes that children are uniquely susceptible to [sexual] abuse as a result of their dependence upon adults, smaller size, and relative naiveté," that "young victims suffer profound harm whenever they are perceived and used as objects of sexual desire," and that "such concerns cannot be satisfied unless the kinds of sexual misconduct that result in criminal liability are greatly expanded where children are concerned." Martinez, 903 P.2d at 1042 (citations and quotations omitted).

For these reasons, I would not endorse, even in dictum, the argument that no crime occurs unless the victim was touched in an inherently lewd manner. I would instead follow Martinez and the weight of authority elsewhere that holds that any touching of an underage child is

"lewd and lascivious" within the meaning of NRS 201.230(1) when sexual arousal or gratification is its goal.

Pickering, J.

I concur:

Hardesty, J.