IN THE SUPREME COURT OF THE STATE OF NEVADA

ALEJANDRO AVILES-PEREZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55035

FILED

APR 28 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
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 one count of sexual assault with a child under the age of 14 years and five counts of lewdness with a child under the age of 14 years. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Respondent State of Nevada charged appellant Alejandro Aviles-Perez by criminal information with two counts of sexual assault and six counts of lewdness. The charges stemmed from Aviles-Perez's sexual abuse of K.A. The jury found Aviles-Perez guilty of one count of sexual assault and five counts of lewdness but returned a not-guilty verdict on the remaining sexual assault count and lewdness count. Aviles-Perez now appeals the judgment of conviction.

On appeal, Aviles-Perez assigns the following errors that he asserts warrant reversal: (1) double jeopardy and redundancy principles preclude his dual convictions for sexual assault (count 1) and lewdness (count 2), (2) the district court erred in denying his Batson challenge, (3) the State committed prosecutorial misconduct, (4) the State presented

insufficient evidence to support his convictions, and (5) the district court provided an erroneous instruction to the jury.[1]

We conclude that Aviles-Perez's dual convictions for sexual assault and lewdness are redundant. We therefore reverse the lewdness conviction (count 2) and remand the matter to the district court for resentencing and entry of a new judgment of conviction. We conclude, however, that Aviles-Perez's remaining contentions are without merit and therefore affirm the remainder of the judgment of conviction. As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

DISCUSSION

Redundancy principles preclude Aviles-Perez's dual convictions for sexual assault and lewdness

Aviles-Perez argues that redundancy principles preclude his dual convictions for sexual assault (count 1) and lewdness (count 2). In response, the State concedes that the lewdness and sexual assault charges were pleaded in the alternative and the dual convictions are redundant. See Wilson v. State, 121 Nev. 345, 355-59, 114 P.3d 285, 292-95 (2005). As such, we reverse the lesser-included lewdness conviction (count 2) and

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[1]Aviles-Perez also asserts that the district court erred in admitting testimony that was hearsay, irrelevant, and amounted to improper vouching. Because Aviles-Perez failed to preserve these issues for appellate review, he has an affirmative burden to demonstrate that his substantial rights were affected by the admission of this evidence, by showing actual prejudice or a miscarriage of justice, which he has not suggested or demonstrated. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). We perceive no plain error.

remand this matter to the district court for resentencing and entry of a new judgment of conviction.

The district court did not err in denying Aviles-Perez's Batson challenge

Aviles-Perez contends, pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), that the district court erred in denying his challenge to the State's dismissal of potential juror nos. 114, 126, 195, and 124. He argues that the State removed these jurors solely on the basis of race, in violation of the Fourteenth Amendment's Equal Protection Clause.[2]

"'[T]he trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal.'" Walker v. State, 113 Nev. 853, 867-68, 944 P.2d 762, 771-72 (1997) (quoting Hernandez v. New York, 500 U.S. 352, 364 (1991)).

Although the State ordinarily is entitled to exercise permitted peremptory challenges for any reason, the Equal Protection Clause forbids eliminating potential jurors based solely on their race. Batson, 476 U.S. at 89. When a defendant raises a Batson challenge, a three-step analysis applies: "(1) the [defendant] must make out a prima facie case of discrimination, (2) the production burden then shifts to the [State] to assert a neutral explanation for the challenge, and (3) the trial court must

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[2]In support of his argument, Aviles-Perez alleges that there were seven non-minority panelists who were similarly situated to the minority panelists; however, the State only sought to remove the minority prospective jurors. The fundamental premise of this assertion, however, is flawed, given that five of the alleged non-minority panelists were excused for cause before the State had an opportunity to exercise a peremptory challenge as to them. We therefore conclude that this claim is without merit.

then decide whether the [defendant] has proved purposeful discrimination." Ford v. State, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006). The first step is rendered moot, however, where the State gives reasons "for its peremptory challenges before the district court determine[s] whether the [defendant] made a prima facie showing of discrimination." Id. "[T]he State's neutral reasons for its peremptory challenges need not be persuasive or even plausible." Id. at 403, 132 P.3d at 577-78. "Where a discriminatory intent is not inherent in the State's explanation, the reason offered should be deemed neutral." Id. at 403, 132 P.3d at 578.

The State offered race-neutral explanations for its peremptory challenges and explained that it challenged potential juror no. 114 because he expressed a need to check work shift availability every two hours. The State asserted that this tended to indicate that potential juror no. 114 was not committed to listening to the evidence. Potential juror no. 126 stated that her mother had been convicted of murder. She indicated that her mother "was a victim of domestic violence for a long time and ultimately snapped." The State asserted that potential juror no. 126 would not be able to remain impartial due to the underlying emotions related to her mother's experience. Potential juror no. 195's father was accused of sexual assault by a juvenile victim. She indicated that she "believe[d her] dad," over the juvenile's accusations, which the State asserted would render her partial and unduly skeptical of K.A. Potential juror no. 124 expressed sympathy for her brother, who had been convicted of serious criminal offenses, and stated that he was unfairly treated by the system. Based on these responses, the State asserted that potential juror no. 124 harbored animosity towards the State and would not be an impartial juror. None of

these reasons indicate an intent to discriminate and therefore each was sufficient to meet the State's burden under step two of the Batson framework. Moreover, other than raising the objection, Aviles-Perez did not make an affirmative attempt to prove purposeful discrimination. We conclude that the district court did not abuse its discretion when it found that Aviles-Perez had failed to prove purposeful discrimination and denied his Batson challenge.

The State did not commit prosecutorial misconduct

Aviles-Perez argues that the State committed various instances of prosecutorial misconduct.

We engage in a two-step analysis when considering prosecutorial misconduct. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). We first determine whether the conduct was improper. Id. If we conclude that it was, we then consider "whether the improper conduct warrants reversal." Id. "With respect to the second step . . . , [we] will not reverse a conviction based on prosecutorial misconduct if it was harmless error." Id.

Shifting the burden of proof

Aviles-Perez asserts that the State committed prosecutorial misconduct when it improperly shifted the burden of proof during its closing argument.

"It is a fundamental principle of criminal law that the State has the burden of proving the defendant guilty beyond a reasonable doubt and that the defendant is not obligated to take the stand or produce any evidence whatsoever." Barron v. State, 105 Nev. 767, 778, 783 P.2d 444, 451 (1989). In general, "[t]he tactic of stating that the defendant can produce certain evidence or testify on his or her own behalf is an attempt to shift the burden of proof and is improper." Id.

During closing argument, Aviles-Perez discussed K.A.'s disclosure of the sexual abuse as having occurred during a period that "has often been referred to as everyone's sort of temporary insanity which is the beginning of your teenage years." On rebuttal, the State sought to negate that assertion by arguing that K.A. had no motivation or reason to fabricate the abuse accusations. The State's comment cannot be read as implying that Aviles-Perez had a burden to produce evidence or a witness demonstrating K.A.'s motive and that he had failed to do so. It was a rebuttal, nothing more. The State's remarks were not improper, and therefore, the district court did not err when it overruled Aviles-Perez's objection.

Arguing facts not in evidence

Aviles-Perez argues that the State committed prosecutorial misconduct during its closing argument when it argued facts not in evidence by stating that, in general, the insertion of a male organ into the anus of another would not cause injury. The State's comment was improper; no such facts were in evidence. See Rose v. State, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007) ("It is improper for the State to refer to facts not in evidence."). Nonetheless, Aviles-Perez objected to this statement, and the objection was sustained. As such, Aviles-Perez suffered no prejudice because the jury was instructed to "disregard any evidence to which an objection was sustained by the court." See Valdez, 124 Nev. at 1188, 196 P.3d at 476 (preserved errors are reviewed for harmless error); Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (the jury is presumed to follow the district court's orders and instructions).

Disparaging defense counsel and the defense's arguments

Aviles-Perez contends that the State committed prosecutorial misconduct by disparaging defense counsel and his arguments when it

referenced his cockroach-in-the-spaghetti analogy by stating, "It's been awhile since I heard the cockroach in the spaghetti." Although the comment seems to imply that the defense's analogy was old or not frequently used, it did not personally disparage counsel or his argument. Notably, Aviles-Perez's objection was sustained; therefore any resulting misconduct was neutralized. See Valdez, 124 Nev. at 1188, 196 P.3d at 476; Summers, 122 Nev. at 1333, 148 P.3d at 783.

Minimizing the reasonable doubt standard

Aviles-Perez asserts that the State committed prosecutorial misconduct when it minimized the reasonable doubt standard by stating that "[r]easonable doubt is a standard that is used in every criminal case in every criminal courtroom across the United States. It's used to secure convictions all the time." Broadly speaking, it is improper for either party to "quantify, supplement, or clarify the statutorily prescribed standard for reasonable doubt." Evans v. State, 117 Nev. 609, 631, 28 P.3d 498, 514 (2001).

During closing argument, Aviles-Perez commented that the State had the burden to prove its case beyond a reasonable doubt and noted "[t]hat [it] is the highest standard of proof recognized by our system of law." In response, the State remarked that the reasonable doubt standard is "used to secure convictions all the time." The State's comment was aimed at informing the jury that, although it is a high standard of proof, it is an attainable one. Whether one characterizes the State's argument as minimizing the reasonable doubt standard, as Aviles-Perez does, or as explaining that the standard is attainable, as the State does, one thing is clear: the State did not "quantify, supplement, or clarify" the reasonable doubt standard as prohibited by our decisions. Evans, 117

Nev. at 631, 28 P.3d at 514. As a result, we conclude that the remark was proper.[3]

There was sufficient evidence to support Aviles-Perez's convictions

Aviles-Perez argues that the State presented insufficient evidence to support his convictions.

To determine whether there is sufficient evidence to support a jury's verdict, we inquire "'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, 123 Nev. at 202, 163 P.3d at 414 (quoting Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998)). Where substantial evidence supports the jury's verdict, it will not be overturned on appeal. Hern v. State, 97 Nev. 529, 531, 635 P.2d 278, 279 (1981).

Aviles-Perez was convicted of one count of sexual assault with a child under the age of 14 years and five counts of lewdness with a child under the age of 14 years. His convictions stemmed from his abuse of K.A. on three separate occasions. K.A. testified that in 2004, when she was nine years old, Aviles-Perez came into her bedroom and undressed her.

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[3]We are also aware that Aviles-Perez believes, apart from the instances he objected to, that the State committed prosecutorial misconduct during closing argument when it disparaged one of the defense's arguments, interjected personal opinion as to the merits of the State's case, and asserted that K.A. was in need of justice and common sense. Because Aviles-Perez failed to preserve these instances for appellate review, he has the burden of establishing that his substantial rights were affected, which he has not suggested in his briefs or demonstrated. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). We conclude that Aviles-Perez has failed to establish that the alleged instances of misconduct amounted to plain error.

She explained that during this encounter, he fondled her breasts, inserted his penis into her anus, and digitally penetrated her vagina with his fingers.

K.A. testified that the second incident occurred shortly before her mother's death, when she was 10 years old. She explained that Aviles-Perez again fondled her breasts and inserted his penis into her anus. K.A. testified that during this encounter, her mother entered the room and discovered that Aviles-Perez was sexually abusing her. K.A.'s sister, A.A., who shared a bed with K.A., testified that she woke up that night because her mother entered the room and, when she did, she remembered that Aviles-Perez was lying on top of K.A. Both K.A. and A.A. testified that there was a family meeting that night about the sexual abuse. According to their testimonies, Aviles-Perez asked the family not to call the police. K.A. explained that during this discussion, Aviles-Perez promised "that he'll stop," while A.A. testified that he stated "he wasn't going to do that again and that he was going to try to change." A.A. also corroborated K.A.'s testimony that Aviles-Perez was wearing shorts that evening.

K.A. testified that the third encounter occurred after her mother's death, when K.A. was still 10 years old. K.A. explained that Aviles-Perez took her into his bedroom, removed her shirt and bra, "lick[ed]" her breasts, and asked her if she "fe[lt] anything." K.A. responded that she did not. She testified that at some point during 2005, she disclosed to her cousin, P.F., that Aviles-Perez was abusing her. This was corroborated by P.F., who testified that K.A. disclosed a "secret" to her, and that K.A. did not want anyone else to find out. Ultimately, K.A. ran away from home and disclosed Aviles-Perez's abuse to one of her aunts and Child Protective Services.

The above evidence, viewed in the light most favorable to the prosecution, sufficiently established that Aviles-Perez committed sexual assault by subjecting K.A. to sexual penetration without her consent. See NRS 200.366(1). Likewise, the evidence sufficiently established that Aviles-Perez committed five separate lewd acts upon K.A.'s body "with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires" of himself or K.A. NRS 201.230(1).

The district court did not provide an erroneous instruction to the jury

Aviles-Perez asserts that the district court erred in giving Jury Instruction No. 16 because it unfairly focused the jury's attention on and highlighted a single witness's testimony.[4]

We review a district court's decision as to jury instructions for an abuse of discretion or judicial error. Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

Jury Instruction No. 16 provided that "[t]here is no requirement that the testimony of a 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." As Aviles-Perez acknowledges in his briefs, in Gaxiola v. State, 121 Nev. 638, 649-50, 119 P.3d 1225, 1233 (2005), we upheld a nearly identical instruction as

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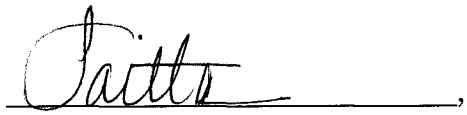
[4]Aviles-Perez also takes issue with Jury Instruction Nos. 5, 7, 11, 16, and 17. None of his challenges relating to these instructions were preserved and therefore we employ plain error review. Green, 119 Nev. at 545, 80 P.3d at 95. We perceive no error in the first instance; all were correct statements of the law. See Rose, 123 Nev. at 204-05, 163 P.3d at 415; Blake v. State, 121 Nev. 779, 799, 121 P.3d 567, 580 (2005); Gaxiola v. State, 121 Nev. 638, 649, 119 P.3d 1225, 1233 (2005); Guy v. State, 108 Nev. 770, 778, 839 P.2d 578, 583 (1992).

a correct statement of the law and concluded that "the instruction does not unduly focus the jury's attention on the victim's testimony." We therefore conclude that the district court did not abuse its discretion in providing Jury Instruction No. 16.[5] Accordingly, 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.



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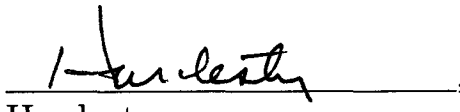

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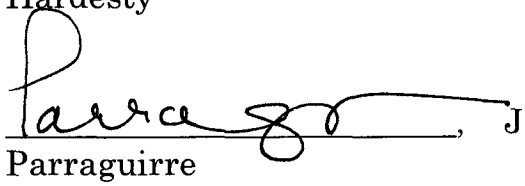

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[5]Aviles-Perez asserts as a final contention that cumulative error warrants reversal of his conviction. Because there is substantial evidence supporting the jury's verdict and Aviles-Perez has failed to successfully assign reversible error to the underlying proceedings, we conclude that his argument is without merit. See Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000) ("Relevant factors to consider in evaluating . . . cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.").

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