

IN THE SUPREME COURT OF THE STATE OF NEVADA

CASTRO V. DECASTRO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55184

FILED

FEB 24 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Mahan*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of sexual assault of a minor under the age of fourteen years, lewdness with a child under the age of fourteen years, and attempted sexual assault of a minor under the age of fourteen years. Eighth Judicial District Court, Clark County; Doug Smith, Judge.

FACTUAL BACKGROUND

A California woman discovered a passage in her stepdaughter's notebook in which the stepdaughter wrote she had been sexually abused by her uncle in Las Vegas. The alleged victim identified Castro DeCastro of Las Vegas as the alleged abuser.

A Las Vegas Metropolitan Police Detective visited DeCastro at his home. DeCastro originally denied the allegations of sexual abuse, but later admitted to kissing the victim on the face and chest and some other abuse with the alleged victim. He also stated that he would not subject his own daughter to similar abuse and indicated that he was not a threat to other children and would not commit a similar offense. The Detective later arrested DeCastro, took him to the police station, and then Mirandized and questioned him. During this questioning, DeCastro explained that the alleged abuse did not go on for three years but rather a month, and stated that he was ashamed to the point of depression and was

contemplating suicide. The jury found DeCastro guilty of one count of sexual assault, one count of lewdness, and of attempted sexual assault.

DeCastro now argues on appeal that: (1) the district court abused its discretion by precluding DeCastro from fully presenting his theory of the defense; (2) the district court abused its discretion by not removing a juror who acknowledged during trial that he lived on DeCastro's street; (3) the district court abused its discretion by allowing the State to file a third amended information for counts I and III; (4) the district court abused its discretion by denying DeCastro's motion to redact portions of his statements relating to suicide, sexual abuse of his daughters, and statements related to other past or future victims; (5) the evidence adduced at trial was insufficient to prove the count IV crime of sexual assault with a minor under the age of fourteen; (6) the district court abused its discretion by denying DeCastro's motions to suppress pre-trial statements; and (7) the State violated DeCastro's constitutional rights by engaging in prosecutorial misconduct during closing argument.¹

¹We do not conclude that the district court erred, so we do not address DeCastro's argument that cumulative error requires reversal. We do note that the victim's testimony and DeCastro's admissions made the issue of guilt not close. See Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000) (stating that one of the three relevant factors for cumulative error analysis is whether the issue of guilt is close). Also, DeCastro waived his argument that the district court abused its discretion by allowing jurors to view transcripts of his statements as an "aid" to actual videotape replays of the same interviews without requiring that the transcripts also be admitted into evidence with the videotaped interviews. See Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (stating that an issue is waived if not timely raised below unless the purported error adversely affected the defendant's substantial rights by causing actual prejudice or a miscarriage of justice).

I. The district court did not abuse its discretion by precluding DeCastro from fully presenting his theory of the defense

DeCastro argues that the district court abused its discretion by precluding him from fully presenting his theory of the defense by denying his continuance motion, limiting cross-examination of the victim's father, and not admitting evidence regarding the father's veracity.² We disagree.

The due process clauses in the Nevada and federal constitutions "assure an accused the right to introduce into evidence any testimony or documentation which would tend to prove the defendant's theory of the case." Pineda v. State, 120 Nev. 204, 214, 88 P.3d 827, 834 (2004) (internal quotations omitted).

DeCastro contends that denying the motion for continuance prevented him from the benefit of presenting a witness with first-hand knowledge of the facts and circumstances surrounding the sexual abuse allegations, which impermissibly restricted his ability to present his

²DeCastro also suggests that the district court erred by denying his request to allow his investigator to testify regarding the circumstances of the father's custody of the girl, the timing and occurrence of the sexual allegations, and the status of the custody dispute between the father and the girl's aunt. We conclude that the aunt was not unavailable for purposes of the hearsay exceptions for statements she made to DeCastro's detective because DeCastro concedes that he could not demonstrate reasonable diligence in trying to secure the aunt's presence at trial by a subpoena. See Drummond v. State, 86 Nev. 4, 8, 462 P.2d 1012, 1014 (1970) (reasoning that the unavailability exception is not applicable where a party has been in contact with a potential witness prior to trial, where that party knows that the potential witness is a resident of a different state and not present in the jurisdiction, and that party fails to compel the potential witness's attendance).

theory of the case.³ Yet, DeCastro was able to gather information he sought from the family witnesses who all testified as to the nature of the ongoing custody battle around the time of the allegations. The father testified that his family took the victim against his will, that he wanted the victim to live with him instead of with the aunt and grandmother, that the victim wanted to be reunited with the aunt, that the aunt filed a lawsuit seeking custody, and that the custody dispute was not entered until after the accusations of sexual abuse.

Because DeCastro fails to specifically demonstrate how he was prejudiced by not having the aunt testify at trial, we conclude that the district court did not abuse its discretion by denying DeCastro's motion for a continuance. See Rose v. State, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007) (stating that the denial of a continuance is not an abuse of discretion if the defendant fails to demonstrate that he was prejudiced).⁴

³DeCastro also asserts that he was prohibited from offering affidavits from the aunt that were obtained from the custody litigation and which were offered for purposes of demonstrating the motive behind the father's desire to have custody of the victim. DeCastro concedes that the aunt's affidavit was testimonial in nature and that DeCastro could not demonstrate reasonable diligence in procuring the aunt's testimony. This argument lacks merit because DeCastro only points to where the district court instructed him to share the affidavits with the prosecution and not to where he was precluded from submitting the affidavits.

⁴DeCastro also contends that he was impermissibly restricted from presenting his theory of the case because he was prohibited from questioning the father about his financial motive for pursuing custody of the father and from submitting evidence of this motive. This argument lacks merit because the district court allowed DeCastro to ask the father about whether he lied about the cause of his wife's death and the document relating to this claim was precluded because nothing tied it to

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II. The district court did not abuse its discretion by failing to remove a juror who admitted during trial that he lived on the same street as DeCastro

DeCastro argues that the district court abused its discretion by failing to remove a juror who admitted during trial to living on the same street as DeCastro. We disagree.

A trial court has broad discretion in deciding whether to remove prospective jurors for cause. Weber v. State, 121 Nev. 554, 580, 119 P.3d 107, 125 (2005) (quotations omitted). In determining if a juror should have been removed for cause, we look at whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. Id. (quotations omitted). Implied bias exists in extreme situations “where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain

... continued

the father. See NRS 50.085 (forbidding the use of extrinsic evidence to prove specific instances of conduct of a witness for purposes of attacking credibility); Crowley v. State, 120 Nev. 30, 34; 83 P.3d 282, 286 (2004). Similarly, DeCastro also argues that the district court abused its discretion by precluding DeCastro from impeaching the credibility of the father during cross-examination. Because the record reflects that DeCastro was able to delve into the father's bias or motivation to influence the victim, to have an interest in the custody dispute, and ask about the victim's mothers' death, we conclude that the district court did not err in limiting DeCastro's cross-examination of the victim. See Lobato v. State, 120 Nev. 512, 520, 96 P.3d 765, 771 (2004) (stating that generally the only proper restrictions should be those inquiries which are repetitive, irrelevant, vague, speculative, or designed merely to harass, annoy, or humiliate the witness) (quotations omitted).

impartial in his deliberations under the circumstances.” Fields v. Brown, 503 F.3d 755, 770 (9th Cir. 2007) (internal quotations omitted). Implied bias is subject to de novo review. Id.

DeCastro submits that sufficient evidence existed for implied bias because the juror lived on the same street as DeCastro, was a father who heard statements that DeCastro might re-offend, and a cautionary instruction could not cure the bias. However, the State never presented evidence to the jury that DeCastro might reoffend with future victims, there is no indication that DeCastro still lived in the location or that the juror had seen anyone related to the case near the scene of the incident. Also, the juror is presumed to have followed the district court’s instruction. See Weber, 121 Nev. at 575, 119 P.3d at 121. We conclude that the district court did not err by refusing to replace the juror because the record does not demonstrate that living down the street from the crime scene would prevent or substantially impair that juror’s duties or otherwise make it highly unlikely that the juror could remain impartial.⁵

⁵DeCastro also erroneously argues that the district court abused its discretion by denying his motion for a new trial following the juror’s revelation that he lived on DeCastro’s street because it was likely that other venire persons heard the revelation. Because we conclude that there was no implied bias or evidence in the record of bias, we also conclude that the district court’s denial of DeCastro’s motion for a mistrial was not a clear abuse of the district court’s discretion. See Evans v. State, 112 Nev. 1172, 1200, 926 P.2d 265, 283 (1996) (stating that the decision to grant a motion for a mistrial is within the sound discretion of the trial court and will not be disturbed on appeal unless there is a clear showing of abuse); Rudin v. State, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004) (stating that sufficient grounds for a mistrial include any where “prejudice occurs that prevents the defendant from receiving a fair trial”).

III. The district court did not abuse its discretion by allowing the State to file a third amended information

DeCastro contends that the district court abused its discretion by allowing the State to file a third amended information that substantially changed counts I and III. We disagree.

A district court decision to allow an amendment is reviewed for an abuse of discretion, but that discretion is abused if an additional or different offense is charged or the substantial rights of the defendant are prejudiced. Green v. State, 94 Nev. 176, 177; 576 P.2d 1123, 1123 (1978); see also NRS 173.095(1).

DeCastro notes that on the fourth day of trial and after the testimony of the victim, the State amended both sexual assault counts I and II and the count III lewdness charge. Counts I and II were changed from “cunnilingus, by placing his mouth and/or tongue on or in the genital opening of [the victim]” to “cunnilingus, by placing his mouth and/or tongue on and/or in the genital opening of [the victim].” Count III was changed from “by fondling and kissing the said [victim’s] breasts and mouth” to “fondling and/or kissing and/or licking the [victim’s] breast and/or mouth.” DeCastro argues that this amendment to the charging document substantially prejudiced him and he contends that wanton amendments after an essential witness has testified undermined his ability to fairly prepare a defense.

However, the evidence supported the State’s alternative theories of prosecution and the changes did not substantially alter the charges or prejudice DeCastro, who would still be convicted under the amendments. Because the amended information did not expand the charges against DeCastro and he fails to demonstrate how the change adversely affected his defense, we conclude that the district court did not

abuse its discretion in allowing the State to amend the information during trial to allow for alternative theories as to how DeCastro committed the sexual assault and lewdness charges. See Benitez v. State, 111 Nev. 1363, 1365, 904 P.2d 1036, 1037-38 (1995) (stating that prejudice will not occur if the charges are not expanded).⁶

IV. The district court did not abuse its discretion by denying DeCastro's request to redact portions of DeCastro's statements

DeCastro argues that the district court abused its discretion by denying DeCastro's request to redact portions of DeCastro's statements regarding suicide as evidence of guilt, the sexual abuse of his daughter, and other past or future victims. We disagree.

The decision to admit or exclude relevant evidence, after balancing the prejudicial effect against the probative value, is within the sound discretion of the trial judge. Sherman v. State, 114 Nev. 998, 1006, 965 P.2d 903, 909 (1998). This decision to admit or exclude evidence is not overturned unless it is manifestly wrong. Id.

DeCastro points to his motion to preclude the use of transcripts from DeCastro's interviews with the Detective in which he argued to exclude statements where (1) the Detective pressured DeCastro to call the victim a liar, (2) DeCastro answered questions about possible past or future victims, and (3) DeCastro discussed suicide relating to being ashamed for his conduct. DeCastro contends that the statements were more likely to sway the jury towards a conclusion that DeCastro was

⁶DeCastro also argued that the district court abused its discretion by allowing the state to amend counts II and V, but conceded in his reply brief that he was acquitted of both counts.

guilty because of suicidal ideation and because of the suggestions that DeCastro might harm other future victims.

However, the statements relating to lying appear unsolicited and not the product of goading, and do not rise to the level of an abuse of discretion by the district court in determining that the probative value of these statements were not substantially outweighed by the danger of unfair prejudice. Similarly, the statements involving his daughter and other potential victims entailed DeCastro adamantly denying that he would sexually assault his daughter or other victims and his answers related to his admission that he assaulted his niece, in which the statements were necessary to give context to DeCastro's admissions of guilt. Finally, it was for the jury to determine the weight and interpretation to give DeCastro's statements and the context in which those statements were made. See Collman v. State, 116 Nev. 687, 711, 7 P.3d 426, 441 (2000).

Because the probative value of consciousness of guilt and providing context to DeCastro's admission were not substantially outweighed by the potential of unfair prejudice, we conclude that the district court did not abuse its discretion by refusing to redact DeCastro's statements.

V. The evidence was sufficient to convict DeCastro of attempted sexual assault with a minor under fourteen years of age

DeCastro argues that the evidence adduced at trial was insufficient to prove the crime of attempted sexual assault with a minor under the age of fourteen. We disagree.

Sufficiency of the evidence requires determining "whether the jury, acting reasonably, could have been convinced beyond a reasonable doubt of the defendant's guilt by the competent evidence." Estes v. Park,

122 Nev. 1123, 1144; 146 P.3d 1114, 1128 (2006). Evidence is viewed “in the light most favorable to the prosecution,” with the question being “whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Id. It is the province of the jury to determine the weight and credibility of conflicting evidence. Id.

“[T]o prove attempted sexual assault, the prosecution must establish that (1) appellant intended to commit sexual assault; (2) appellant performed some act toward the commission of the crime; and (3) appellant failed to consummate its commission.” Bell v. State, 105 Nev. 352, 354, 775 P.2d 1273, 1274 (1989).

DeCastro notes that the information charged DeCastro with attempted sexual assault with a minor under the age of fourteen because DeCastro attempted to sexually assault the victim by attempting to have her perform sexual acts. DeCastro points out that the victim testified that after DeCastro asked her to perform sexual acts and she declined, DeCastro said he was just joking and put his penis back in his pants. DeCastro argues that no other action was taken towards “sexual penetration,” in which there was no show of force or intimidation, and he suggests that there was no intent to complete the sexual assault. DeCastro contends that if his conviction for attempted sexual assault stands, any stereotypical flasher could be charged with attempted sexual assault for any repeated instance of flashing his private parts to a single individual.

However, the circumstances of the case and the prior sexual abuse of the victim support the notion that DeCastro had a clear design to convince the victim to perform fellatio upon him. The prior sexual interactions, combined with the attempted fellatio, allowed a reasonable

jury to conclude beyond a reasonable doubt that DeCastro had the intent to commit a sexual assault upon the victim sufficient to sustain a guilty verdict. We conclude that the evidence was sufficient for a jury to determine beyond a reasonable doubt that DeCastro attempted to have the victim perform fellatio on him.

VI. The district court did not abuse its discretion by denying DeCastro's motion to suppress the pre-trial statements he made to the Detective

DeCastro argues that the district court abused its discretion by denying his motions to suppress the August 30, 2006 pre-trial statements to the Detective because the statements were the product of custodial interrogation and were involuntary. We disagree.

A trial court's determinations of custodial interrogation and voluntariness under the Fifth Amendment present mixed questions of law and fact. Rosky v. State, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005). The "proper inquiry requires a two-step analysis [in which] [t]he district court's purely historical factual findings pertaining to the 'scene- and action-setting' circumstances surrounding an interrogation is entitled to deference and will be reviewed for clear error," but "the district court's ultimate determination of whether a person was in custody and whether a statement was voluntary will be reviewed de novo." Id.

"Custody" for Miranda purposes means a formal arrest or restraint on freedom of movement to the degree associated with a formal arrest, in which the pertinent inquiry is whether, under the totality of circumstances, a reasonable person in the suspect's position would feel at liberty to terminate the interrogation and leave. Id. at 191; 111 P.3d at 695 (quotations omitted). Voluntariness requires the prosecution to prove by a preponderance of evidence that the statement was voluntary and that the defendant's will was not overborne. Rosky, 121 Nev. at 193; 111 P.3d

at 696. A statement is involuntary “if it was coerced by physical intimidation or psychological pressure.” Id. Relevant factors include the suspect’s age, education, intelligence, advisement of constitutional rights, length of detention, subjection to repeated or prolonged questioning, and the subjection to physical punishment such as food or sleep deprivation. Id. at 193-94; 111 P.3d at 696.

DeCastro argues that his statements to the Detective involved custodial interrogation in which the Detective failed to Mirandize him, and that his statements were not voluntary because he did not understand English and the Detective’s race, size, and gun intimidated him. While the Detective did not Mirandize DeCastro, a reasonable person would not have believed he or she was in police custody because the interview took place in DeCastro’s kitchen after he invited the Detective into his home, DeCastro’s statements appeared voluntary even though the Detective aggressively questioned him for roughly forty minutes, DeCastro did not ask the Detective to leave during the interview, and the Detective did not arrest, restrain, or otherwise inhibit DeCastro’s movement. We conclude that the district court did not err by finding that there was no custodial interrogation and no need to Mirandize DeCastro.

DeCastro’s statements and the circumstances also clearly demonstrate that he understood the Detective and that his statements were voluntary. We conclude that the district court did not err by determining the statements were voluntary. Because the district court did not err in determining that there was no need to Mirandize DeCastro and that his statements were voluntary, we hold that the district court did not abuse its discretion by refusing to suppress DeCastro’s August 30, 2006 admissions.

VII. Prosecutorial misconduct

DeCastro argues that the State violated his constitutional rights by engaging in prosecutorial misconduct. We disagree.

Prosecutorial misconduct is reviewed under the circumstances of the case and if prosecutor statements are deemed improper, then the issue becomes whether the statements were harmless beyond a reasonable doubt. Rudin, 120 Nev. at 136-37, 86 P.3d at 582. An improper statement is harmless if the verdict would have been the same without the statement. Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155-56 (1988). A failure to object to alleged instances of prosecutorial misconduct will preclude appellate review unless there is plain error that either (1) prejudicially impacts the verdict when viewed in the context of the whole trial, or (2) seriously affects the integrity or public reputation of judicial proceedings. Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118 (2002) (quotations omitted). The level of misconduct necessary to reverse a conviction depends upon the strength and convincing nature of the evidence of guilt, in which misconduct will probably be considered prejudicial if the issue of guilt or innocence is close. Rowland, 118 Nev. at 38; 39 P.3d at 118-19 (quotations omitted).

DeCastro argues that the State committed prosecutorial misconduct by making the following comment: “Other than these people’s lives turned upside down for a few years while they’ve got to come back to Vegas and testify in certain cases. [The victim] is dragged down to the doctor’s by her parents to have a spread eagle exam” DeCastro objected to this statement by saying that there was no evidence of a sexual assault examination and the district court admonished the jury that the arguments of counsel were not facts and that they must rely upon their own memories of the evidence to make their decisions. DeCastro argues

that there was no reason to reference the exam as “spread eagle” other than for the purpose of being inflammatory and to infect the proceedings with prejudicial unfairness. Although “spread eagle” was intended to appeal to the jury’s sympathies and was an unnecessary description, this statement did not rise to prosecutorial misconduct because the Detective’s testimony supported the statement that the victim underwent a sexual assault exam and the prosecutor appears to have referenced the exam in order to rebut DeCastro’s argument that the victim had a motive to lie.

DeCastro next argues that the State committed prosecutorial misconduct by stating “[s]oft denials at the beginning, certain things, though, remain staunch denials throughout. [DeCastro] never put my penis in [sic] and we know that to be true. I never touched my daughter. There’s no shaking him off that.” DeCastro did not object to this argument but notes that he objected to the following related statement by the State:

Was she the only one or are there more girls out there? She’s the only one. Cross my heart. I’m sorry about what happened. I’m sorry. I’m really sorry. I think of ending my life because of my problem. I’m ashamed. I’m ashamed to my family and my brother and my sisters.

DeCastro argued that the statements referenced by the State were not direct quotes. Yet, his admissions entailed essentially the same admissions, so the prosecutor’s use of DeCastro’s statements regarding guilt, shame, and suicide was not prosecutorial misconduct.

DeCastro next argues that the State committed prosecutorial misconduct by stating that “[b]ecause of the nature of these allegations so many kids, they can’t remember all of them or they remember them differently at different times.” DeCastro notes that he objected based on the State’s reliance on its personal knowledge to make this statement.


The district court admonished the jury that the argument was not evidence and DeCastro does not plead facts to explain why this statement was misconduct or how it contributed to the verdict. The prosecutor's statement relating to child testimony in sexual assault cases was not prosecutorial misconduct because it was logically related to the victim's testimony and DeCastro's argument regarding the victim's veracity.

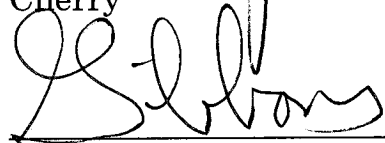
Finally, DeCastro argues that the State impermissibly referenced conduct that DeCastro had not been charged with: "[T]he point is that you heard testimony regarding more counts than you have to convict him of. There's a free lewdness out there that he's not been charged with for licking the breasts." DeCastro notes that he told the judge that this "shouldn't be discussed" and the district court instructed the State to discontinue the line of argument. But, DeCastro's closing statements included the following argument: "Most troubling of all, we've got a whole new count here. We've got [the victim] being forced to touch Mr. DeCastro, vivid details, where it was, what she did, where she was looking." DeCastro continued to question the victim's memory throughout closing argument. The prosecutor's statement relating to the uncharged conduct was not prosecutorial misconduct because it addressed the victim's testimony and DeCastro's arguments.

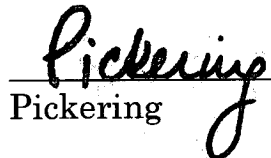
Because we conclude that the challenged statements do not rise to the level of prosecutorial misconduct, we hold that the State did not

commit prosecutorial misconduct.⁷

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Pickering

cc: Hon. Doug Smith, District Judge
The Almase Law Group LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁷DeCastro also suggests that it was prosecutorial misconduct for the State to reference the death of the victim's mother as a means of bolstering the victim's veracity. DeCastro waived this argument by not objecting.