IN THE SUPREME COURT OF THE STATE OF NEVADA

CAESAR ALMARTIN ADAMSON, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56014

FILED

MAY 10 2012

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 sexual assault of a child under the age of 14, lewdness with a child under the age of 14, and battery with the intent to commit a crime. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge. Appellant Caesar Adamson, Jr., raises eight issues on appeal.

Sufficiency of the evidence

Adamson argues that the State failed to present sufficient evidence to sustain his convictions. At trial, the 11-year-old victim testified that Adamson forcibly held her on top of him and rubbed her leg and genitals with his penis. In addition, Adamson admitted to detectives that he touched the victim with his penis. We conclude that this evidence was sufficient for a rational juror to find beyond a reasonable doubt see Jackson v. Virginia, 443 U.S. 307, 319 (1979); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) that Adamson was guilty of lewdness with a child under the age of 14, NRS 201.230(1), and battery with the intent to commit a crime, NRS 200.400(1)(a), (4)(c). 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))). However, considering the record in the light most favorable to the prosecution, we cannot conclude that sufficient evidence supports the conviction for sexual assault. While testimony supports the conclusion that he touched the victim's genital area with his penis, there is no specific testimony that Adamson's penis even slightly penetrated the victim's genital opening. See NRS 200.366(1) (requiring "sexual penetration"); NRS 200.364(4) (defining "sexual penetration"). Accordingly, we reverse Adamson's conviction for sexual assault of a minor under the age of 14.

Refusal to admit defense evidence

Adamson argues that the district court improperly refused to permit him to ask his wife about the lengthy prison sentence her father received for committing child sexual abuse. We discern no abuse of discretion. See Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006) (providing that this court reviews a district court's decision to admit or exclude evidence for an abuse of discretion). The district court permitted Adamson to admit evidence that his wife was seeing another man and that she had experience with the effects of sexual abuse accusations. The district court properly precluded specific details of the sentence received because such evidence is not relevant to the issue of Adamson's guilt. See U.S. v. Frank, 956 F.2d 872, 879 (9th Cir. 1991) ("It has long been the law that it is inappropriate for a jury to consider or be informed of the consequences of their verdict.").

Prosecutorial misconduct

Adamson argues that the prosecutor committed multiple instances of misconduct during cross-examination and closing arguments.

Because Adamson failed to object to any of the instances below, we review for plain error. Rose v. State, 123 Nev. 194, 208-09, 163 P.3d 408, 418 (2007).

First, he asserts that the prosecutor improperly forced him to comment on the complaining witness's credibility. We disagree. As Adamson directly challenged the witness's testimony, the prosecutor could appropriately ask him if he believed that the witness's testimony was untruthful. See Pascua v. State, 122 Nev. 1001, 1007-08, 145 P.3d 1031, 1035 (2006).

Second, Adamson asserts that the prosecutor vouched for the complaining witness's credibility and opined as to the merits of the government's case while cross-examining Adamson. We discern no plain error. The prosecutor's comments, described the victim's testimony, referred to the victim's testimony as "descriptive," stated that the victim was too young to have fabricated the allegations, described the victim's mother's testimony about reporting the abuse to police, and said that the victim's testimony was sufficient to prove the allegations. Those comments emphasized the particular hallmarks of credibility in the victim's story in an attempt to contest Adamson's contradictory testimony. The prosecutor did not place "the prestige of the government behind the witness by providing personal assurances of [the] witness's veracity." Browning v. State, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (internal quotations omitted).

Third, Adamson argues that the prosecutor committed misconduct by suggesting that he had a duty to present evidence. We disagree. The prosecutor's questions during cross-examination did not shift the burden to Adamson to produce evidence, but merely pointed out that there was a lack of evidence supporting his theory that the victim

fabricated the report of abuse at his wife's behest. See Menendez v. Terhune, 422 F.3d 1012, 1034 (9th Cir. 2005) ("A prosecutor may, consistent with due process, ask a jury to convict based on the defendant's failure to present evidence supporting the defense theory."). But see McNelton v. State, 115 Nev. 396, 409, 990 P.2d 1263, 1271-72 (1999) (holding that prosecutor shifted burden of proof by commenting on a defense witness's absence).

Fourth, Adamson argues that the prosecutor committed misconduct by vouching for the victim and arguing about facts not in evidence during closing argument. We discern no plain error. The prosecutor, who argued that the victim was telling the truth based on the details presented in her testimony contrasted against her young age, did not vouch for the witness or refer to facts not in evidence. Instead, the statement constituted proper argument based on evidence received at trial and the common sense of the jury. See U.S. v. Kojayan, 8 F.3d 1315, 1321 (9th Cir. 1993) (providing that a prosecutor may properly ask the jury to use common sense).

Witness vouching

Adamson argues that the trial court improperly admitted testimony from Detective Paul Gasca that amounted to improper vouching. We discern no plain error. See Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) (reviewing instances of vouching for plain error where defendant fails to object at trial). Detective Gasca's explanation of events did not improperly vouch for the victim's testimony, but merely explained the course of the police investigation.

Double jeopardy

Adamson argues that double jeopardy and redundancy principles prohibit his multiple convictions that arose from a single

uninterrupted encounter. We disagree. First, Adamson's convictions for lewdness with a child under the age of 14 and battery with the intent to commit a crime do not violate double jeopardy because each offense "requires proof of an additional fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932); see NRS 201.230(1) (requiring proof of a lewd and lascivious act made upon a child with the intent to arouse the sexual desires of the perpetrator or child); NRS 200.400(1)(a) (requiring proof of use of force or violence upon victim with intent to commit a crime); Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003) (utilizing Blockburger test for double jeopardy analysis). Second, the convictions for battery with the intent to commit a crime and lewdness with a child are not redundant because the gravamen of the charged offenses is different. See State of Nevada v. Dist. Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000); see also NRS 200.400 (gravamen of battery is the use of force or violence); NRS 201.230 (gravamen of lewdness is the lewd act done with intent of appealing to or gratifying lust of perpetrator or victim).

Jury instructions

Adamson argues that the district court plainly erred in instructing the jury. Specifically, he contends that the court erred in instructing the jury on multiple acts as part of a single encounter, giving the "no corroboration" instruction, instructing the jury that the victim is not required to remember the exact date of the abuse, instructing the jury that voluntary intoxication is not a defense to sexual assault or lewdness, and instructing the jury that "[t]he Defendant is presumed innocent until the contrary is proved." We discern no plain error affecting Adamson's substantial rights for the following reasons. See Ford v. State, 122 Nev. 796, 804, 138 P.3d 500, 506 (2006) (reviewing jury instructions for plain

error where defendant fails to object). First, the given instruction on multiple sexual acts as part of a single criminal encounter accurately reflected Nevada law. See Townsend v. State, 103 Nev. 113, 120-21, 734 P.2d 705, 710 (1987). Second, the given "no corroboration" instruction was legally correct and did not instruct the jury to give the victim's testimony greater weight. See Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005). Third, when time is not an essential element of the offense, the State is not required to allege or prove the specific date of the offense, see Cunningham v. State, 100 Nev. 396, 400, 683 P.2d 500, 502 (1984), therefore, the given instruction accurately reflected Nevada law. Fourth, while the district court plainly erred in instructing the jury that voluntary intoxication was not a defense to lewdness with a minor, see State v. Catanio, 120 Nev. 1030, 1036, 102 P.3d 588, 592 (2004) (providing lewdness with a minor is specific intent crime); Ewish v. State, 110 Nev. 221, 228, 871 P.2d 306, 311 (1994) (holding voluntary intoxication is defense to specific intent crimes), Adamson did not demonstrate prejudice affecting his substantial rights as he had testified that he did not use drugs or molest the victim. See Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). Lastly, the presumption of innocence instruction followed the express language of NRS 175.191 and did not undermine the State's burden of proof or the presumption of innocence. See Blake v. State, 121 Nev. 779, 799, 121 P.3d 567, 580 (2005).

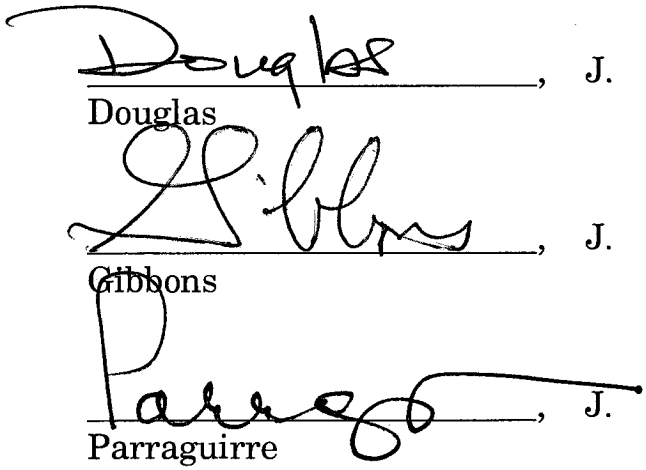
Cumulative error

Adamson argues that cumulative error warrants reversal of his convictions. Based on the foregoing discussion, we conclude that any error in this case when considered either individually or cumulatively, does not warrant relief. See Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002); Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114,

115 (1975) (defendant is "not entitled to a perfect trial, but only to a fair trial").

Having reviewed Adamson's contentions, we

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



_____, J.
Douglas

_____, J.
Gibbons

_____, J.
Parraguirre

cc: Hon. Linda Marie Bell, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk