IN THE SUPREME COURT OF THE STATE OF NEVADA

PATRICK OWEN MADSEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57068

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, for two counts of sexual assault of a minor under the age of 14 and two counts of lewdness with a minor under the age of 14. Seventh Judicial District Court, Lincoln County; Lee A. Gates, Judge. Appellant Patrick Owen Madsen raises three contentions on appeal.

First, Madsen contends that insufficient evidence was produced at trial to support the charges against him. We disagree. The victim testified that Madsen forced her to engage in sexual intercourse twice, fondled and licked her breasts, and put his mouth on her vagina. 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))). While he contends that some of the victim's testimony contradicted her prior statements, it was for the jury to determine the weight and credibility to give the conflicting testimony. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). In addition, both

Madsen's semen and the victim's DNA were recovered from stains on the sofa on which the victim indicated the abuse occurred. Madsen also admitted to the police that he had sex with the victim. We conclude that this evidence was sufficient for a rational juror to find beyond a reasonable doubt that Madsen was guilty of lewdness with a child under the age of 14 and sexual assault of a child under the age of 14. 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).

Second, Madsen argues that his sentences for lewdness and sexual assault constitute cruel and unusual punishment because the applicable sentencing statutes do not permit the district court to conduct any proportionality analysis. We disagree. The Eighth Amendment does not require strict proportionality between crime and sentence but forbids only an extreme sentence that is grossly disproportionate to the crime. Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991). Because the sentences fall within statutory limits, see NRS 200.366; NRS 201.230, and are not grossly disproportionate to the crime, the punishment is not cruel and unusual. See Allred v. State, 120 Nev. 410, 421, 92 P.3d 1246, 1254 (2004).

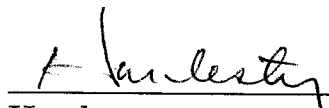
Third, Madsen argues that the district court abused its discretion in refusing to give a proposed instruction on reasonable mistaken belief of consent pursuant to Honeycutt v. State, 118 Nev. 660, 56 P.3d 362 (2002), overruled on other grounds by Carter v. State, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005). We agree. Because there was slight evidence supporting the instruction, see Rosas v. State, 122 Nev. 1258, 1264-65, 147 P.3d 1101, 1106 (2006) (providing that defendant is entitled to instruction on any reasonable theory of case where there is any

evidence, however slight, supporting theory), the district court abused its discretion in refusing to give the proposed instruction, see Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Further, we cannot conclude that the district court's error was harmless beyond a reasonable doubt in light of evidence adduced at trial and the district court's erroneous instruction that consent is not a defense to the charge of sexual assault of a child under the age of 14. See State v. Dist. Ct. (Epperson), 120 Nev. 254, 259, 89 P.3d 663, 666 (2004) (recognizing that evidence that could show consent to participate in sexual activity is material in prosecution for sexual assault of child under age of 14). Therefore, we reverse Madsen's convictions for sexual assault of a minor under the age of fourteen and remand for a new trial.[1]

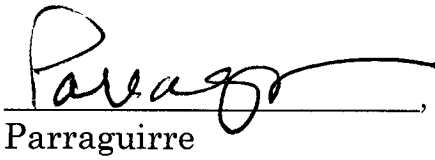
Having considered Madsen's contentions and for the reasons set forth above, we

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.
Saitta



_____, J.
Hardesty



_____, J.
Parraguirre

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[1]As the jury may find a defendant guilty of lewdness with a minor under fourteen regardless of whether the victim consented, Epperson, 120 Nev. at 259 n.8, 89 P.3d 663, 666 n.8, Madsen's convictions for lewdness are unaffected by the failure to give the proposed instruction.

cc: Hon. Lee A. Gates, District Judge
State Public Defender/Carson City
Waters Law Firm LLC
Attorney General/Carson City
Lincoln County District Attorney
Lincoln County Clerk