IN THE SUPREME COURT OF THE STATE OF NEVADA

MANUEL MELENDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57594

FILED

JAN 12 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 six counts of lewdness with a child under 14 years of age. Eighth Judicial District Court, Clark County; James M. Bixler, Judge. Appellant Manuel Melendez argues that his convictions should be reversed on the following grounds: (1) the evidence was insufficient; (2) the district court abused its discretion in denying his motion for a new trial based on conflicting evidence and newly discovered evidence; (3) the State committed prosecutorial misconduct; and (4) the district court erred by instructing the jury on sexual assault.

First, Melendez argues that there was insufficient evidence to support his convictions. 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); NRS 201.230. 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.

At trial, the victim's grandmother testified that she witnessed Melendez hug the victim's naked body in his bed on two separate occasions and fondle the buttocks of the naked victim on another occasion. The victim's aunt testified that the victim told her that Melendez put his penis on her buttocks. We conclude that the grandmother's testimony was sufficient to support the convictions for Counts 3, 4, and 5, and the aunt's testimony was sufficient to support the conviction for Count 6. Melendez contends that the grandmother's and the aunt's testimony was incredible as a matter of law because they expressed hostility towards him, they did not contact the police immediately about the sexual conduct, and the grandmother was unable to remember specific dates and had a motive to fabricate. We disagree. Melendez denied any sexual misconduct at trial and testified that the victim's grandmother, who was his wife at the time of the offenses, instigated the prosecution because he asked her for a divorce and she was jealous of him. The jury was presented with contradictory testimony, and it was not unreasonable for the jury to accept the grandmother's and aunt's testimony as true and to reject Melendez's theory of defense. See Rembert v. State, 104 Nev. 680, 682, 766 P.2d 890, 891 (1988); see also McNair, 108 Nev. at 56, 825 P.2d at 573.

We further conclude that the child victim's testimony was sufficient evidence to support Melendez's conviction on Count 1. See Rose v. State, 123 Nev. 194, 203, 163 P.3d 408, 414 (2007). The victim, who was 7 years old at trial, testified that Melendez touched her "pee pee" (vagina), and she demonstrated that he rubbed it back and forth with his palm. Although the victim could not specifically recall where or when the

incident occurred, and she contradicted herself on several details, the victim described the incident with sufficient detail for a jury to infer that the touching was done in a lewd manner and Melendez acted with the requisite intent. See id.; see also Cunningham v. State, 100 Nev. 396, 400, 683 P.2d 500, 502 (1984) (time and date are not essential elements of a sexual offense against a minor); Grant v. State, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001) ("Intent need not be proven by direct evidence but can be inferred from conduct and circumstantial evidence."); NRS 201.230. In addition, the victim's testimony was corroborated by the grandmother's and aunt's testimony that the victim had disclosed to them that Melendez touched her vagina.

As to Count 2, however, we agree with Melendez that the evidence was not sufficient to support his conviction. We have held that a child victim is not required to "specify exact numbers of incidents, but there must be some reliable indicia that the number of acts charged actually occurred." LaPierre v. State, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992). The evidence used to prove Count 2 was the victim's out-of-court statement to her aunt that Melendez had touched her "pee pee." Nothing in the victim's statement distinguished this incident from the incident charged in Count 1, and the victim testified at trial that the touching had occurred only one time. See Gaxiola v. State, 121 Nev. 638, 652-53, 119 P.3d 1225, 1235 (2005). Because the evidence did not establish that Melendez's convictions under Counts 1 and 2 were based on two separate acts, his conviction under Count 2 must be vacated. See LaPierre, 108 Nev. at 531, 836 P.2d at 58; see also Braunstein v. State, 118 Nev. 68, 79, 40 P.3d 413, 421 (2002).

We therefore conclude that sufficient evidence supports Melendez's convictions on Counts 1, 3, 4, 5, and 6, but we reverse Melendez's conviction on Count 2 and remand the matter to the district court with instructions to vacate his conviction on Count 2 and resentence him accordingly. Having vacated his conviction on Count 2, we evaluate the rest of his arguments on appeal only as to the remaining convictions.

Melendez next contends that the district court erred in denying his motion for a new trial based on conflicting evidence. Specifically, he argues that he presented evidence of his whereabouts during the period of time at issue, and the inability of the State witnesses to offer specific dates of the offenses merited a conclusion that the jury erroneously found him guilty. Here, the district court evaluated the evidence presented to the jury and determined that a new trial was not warranted. See NRS 176.515; Walker State, 109 Nev. 683, 685-86, 857 P.2d 1, 2 (1993); State v. Purcell, 110 Nev. 1389, 1393, 887 P.2d 276, 278 (1994). While some of the evidence may have been conflicting, it was not so at odds with the verdict that the "totality of evidence fail[ed] to prove the defendant guilty beyond a reasonable doubt." Walker, 109 Nev. at 685-86, 857 P.2d at 2. Accordingly, we conclude that the district court did not abuse its discretion in denying Melendez's motion for a new trial based on conflicting evidence. See Domingues v. State, 112 Nev. 683, 695, 917 P.2d 1364, 1373 (1996).

Melendez also sought a new trial based on newly discovered evidence that, during the time frame of the offenses, the grandmother and victim had been evicted from the residence where the offenses were committed. He argues that the district court erred in denying him a new trial because this evidence established that the offenses could not have

occurred at the time and location alleged by the grandmother. We disagree. See Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991) (outlining the factors required to prevail on a motion for new trial based on newly discovered evidence). Here, the newly discovered evidence in the form of an eviction invoice does not indicate the probability of a different result upon retrial because, even if the invoice were to establish that the grandmother and victim were evicted from the residence, the offenses could have been committed before the eviction, well within the charged time frame. Furthermore, there was no showing by Melendez that the eviction invoice could not have been discovered earlier with due diligence. See id. Accordingly, we conclude that the district court did not abuse its discretion in denying his motion. See id. at 406, 812 P.2d at 1284.

Melendez next argues that the State committed prosecutorial misconduct when it introduced the victim's out-of-court statements through the testimony of her aunt and grandmother after the victim had already testified. Melendez contends that he could not cross-examine the victim about those out-of-court statements without prejudicing himself before the jury by recalling the victim to the stand. Melendez did not object when the State sought to introduce the victim's out-of-court statements after the victim had been excused as a witness. Generally, the failure to object to the prosecutorial misconduct at trial precludes appellate review. Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). However, we will review for plain error affecting a defendant's substantial rights. Id.

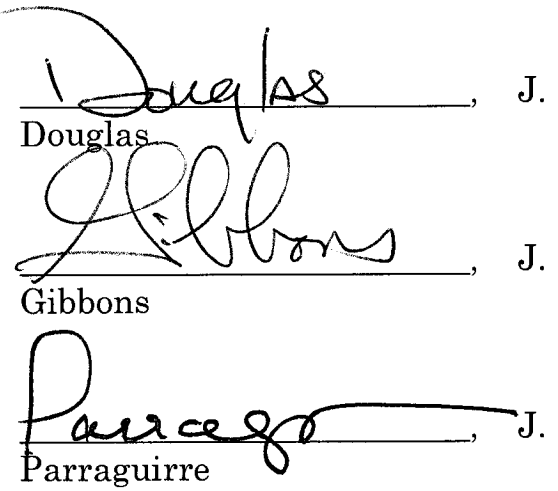
Melendez could have asked the court to recall the victim as a witness so that he could cross-examine her. See Felix v. State, 109 Nev.

151, 192-93, 849 P.2d 220, 248 (1993) ("In order to avoid interfering with the defense's opportunity to cross-examine effectively, we construe NRS 51.385 to require that either the State or the court recall a child witness upon the request of the defense, if hearsay statements not firmly rooted in a hearsay exception are introduced subsequent to the child's testimony, and the child-victim did not cover the statements in his or her testimony." (emphasis added)), superseded on other grounds by statute as stated in Evans v. State, 117 Nev. 609, 625, 28 P.3d 498, 509-10 (2001). Melendez did not make such a request, and thus we conclude that he has not shown any error with regard to the order in which the witnesses testified.

Finally, Melendez argues that the district court erred by instructing the jury on the definition of sexual assault, which allowed the jury to convict him for lewdness based on the uncharged and legally invalid offense of sexual assault. We disagree. The district court instructed the jury that Melendez was charged with lewdness, which involves committing a lewd or lascivious act other than an act constituting the crime of sexual assault. See NRS 201.230. The district court instructed the jury on the definition of sexual assault to help the jury understand and distinguish acts of lewdness from acts of sexual assault. We conclude that this instruction was not erroneous and his convictions were not based on the legally invalid theory of sexual assault. See Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) ("[T]his court generally presumes that juries follow district court orders and instructions.").

Having reviewed Melendez's claims and concluded that he is only entitled to the relief described 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.
Douglas

_____, J.
Gibbons

_____, J.
Parraguirre

cc: Hon. James M. Bixler, District Judge
Kristina M. Wildeveld
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk