IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK FREDRICK GILLIAM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59525

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of twelve counts of lewdness with a minor under the age of 14 and six counts of sexual assault of a minor under the age of 14. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

Prior bad acts

Appellant Jack Gilliam contends that the district court erred in admitting evidence of prior bad acts without holding a hearing pursuant to *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985). Prior to trial, the defense sought to introduce an accusation made during an argument between Gilliam and the victim's father. The district court ruled that the discussion of this argument would not open the door to the introduction of Gilliam's prior conviction but that the State could introduce other accusations leveled during the argument to provide context. The State introduced evidence of these other accusations and testimony from the victim's mother about an incident in which she woke up to find Gilliam fondling her breasts.

As to the admission of the victim's father's other accusations against Gilliam, we cannot conclude that the district court's decision

exceeded the bounds of law or reason. *See Ramet v. State*, 125 Nev. 195, 198, 209 P.3d 268, 269 (2009) (reviewing admission of evidence for abuse of discretion); *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) ("An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." (internal quotation marks omitted)). While the evidence of the father's accusations may have been inadmissible, Gilliam opened the door to this evidence by seeking admission of one of the accusations. *See Taylor v. State*, 109 Nev. 849, 857, 858 P.2d 843, 848 (1993) (Shearing, J., concurring in part and dissenting in part) ("Ordinarily inadmissible evidence may be rendered admissible when the complaining party is the party who first broached the issue."); *see, e.g., United States v. Tolliver*, 454 F.3d 660, 666 (7th Cir. 2006) ("Statements providing context for other admissible statements are not hearsay because they are not offered for their truth.").

As to the victim's mother's testimony concerning Gilliam touching her as she slept, we conclude that it was not admissible. The mother's testimony referred to an incident separate from the conversation during which the victim's father leveled accusations against Gilliam and described prior uncharged conduct by Gilliam. As such, the district court plainly erred in admitting the evidence absent a *Petrocelli* hearing. Nevertheless, the error did not affect Gilliam's substantial rights as it was brief and the nature of evidence presented was not convincing. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (reviewing unobjected-to error for plain error effecting defendant's substantial rights).

Prosecutorial misconduct

Gilliam asserts that the prosecutor engaged in six instances of prosecutorial misconduct.

First, Gilliam asserts that the prosecutor improperly asked Gilliam if other witnesses lied during his cross-examination. In *Daniel v. State*, 119 Nev. 498, 519, 78 P.3d 890, 904 (2003), "[w]e adopt[ed] a rule prohibiting prosecutors from asking a defendant whether other witnesses have lied or from goading a defendant to accuse other witnesses of lying, except where the defendant during direct examination has directly challenged the truthfulness of those witnesses." Here, the prosecutor inappropriately goaded Gilliam into calling witnesses liars. However, counsel for Gilliam did not object to these two instances and, standing alone, these errors did not affect his substantial rights. *See Pascua v. State*, 122 Nev. 1001, 1007, 145 P.3d 1031, 1034 (2006).

Second, Gilliam contends that the prosecutor committed misconduct during questioning of the victim's father by misstating evidence from the victim's brother's testimony. In response to Gilliam's objection, the district court instructed the jury that it was to rely on its own recollection of the evidence. The jurors were later instructed that the statements of counsel were not evidence. Considering these instructions, we cannot conclude that the prosecutor's statements "so infect[ed] the proceedings with unfairness as to make the results [of trial] a denial of due process." *Browning v. State*, 124 Nev. 517, 533, 188 P.3d 60, 72 (2008) (internal quotation marks omitted).

Third, Gilliam asserts that the prosecutor vouched for the victim's testimony during closing argument by offering her own opinion concerning the victim's veracity. We discern no plain error. *See Valdez*,

124 Nev. at 1190, 196 P.3d at 477. The prosecutor argued that the victim was telling the truth based on the concepts the victim discussed in contrast with the victim's young age, the vocabulary she used in discussing the events, and the clarity of her testimony. She also drew possible inferences from the evidence to explain inconsistencies and gaps in the victim's testimony. She did not vouch for the witness or refer to facts not in evidence. Instead, the statements constituted proper argument based on evidence received at trial and the common sense of the jury. *See United States v. Kojayan*, 8 F.3d 1315, 1321 (9th Cir. 1993) (providing that a prosecutor may properly ask the jury to use common sense).

Fourth, Gilliam contends that the prosecutor vouched for the victim's father and opined that the victim's cousin was lying about a prior bad act. We discern no plain error. *See Valdez*, 124 Nev. at 1190, 196 P.3d at 477. The prosecutor, by arguing that the victim's father did not have a rational motivation to fabricate the previous incident regarding the victim's cousin, 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 Kojayan*, 8 F.3d at 1321.

Fifth, Gilliam argues that the prosecutor committed misconduct by alluding to facts unsupported by the evidence. He contends that no evidence supports the prosecutor's argument that the trauma of the offense caused the victim to start wetting the bed. We agree. No testimony was introduced that demonstrated that possible abuse could cause bedwetting. Moreover, the testimony about bedwetting failed to establish that the first instance of abuse preceded the bedwetting.

However, counsel did not object to this comment and, standing alone, the error did not affect Gilliam's substantial rights. *See Pascua*, 122 Nev. at 1007, 145 P.3d at 1034.

Sixth, Gilliam argues that the prosecutor offered her personal opinion and misrepresented the law regarding sexual assault by arguing that "it's an impossibility to rub a penis or any other object onto a vagina without meeting the legal definition of penetration, which is, however slight." We discern no plain error. Given the brevity of the comment, the evidence produced at trial, and the district court's instructions on sexual assault and lewdness, we cannot say that the comment affected Gilliam's substantial rights. *See Valdez*, 124 Nev. at 1190, 196 P.3d at 477.

Vouching

Gilliam argues that the district court improperly admitted evidence that vouched for the victim's veracity. He asserts that the expert testimony regarding the lack of physical findings in the sexual assault exam and the statistical incidence in which such physical symptoms are found improperly bolstered the victim's veracity. We discern no plain error. *See* NRS 178.602; *Mclellan v. State*, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008). The testimony concerning the expert's physical findings and statistics related to sexual assault cases was based on her personal knowledge and experience in conducting sexual abuse examinations on children. The fact that this testimony may have incidentally validated the victim's testimony did not render it impermissible vouching. *See Townsend v. State*, 103 Nev. 113, 118, 734 P.2d 705, 709 (1987). Although the expert's statement that the believability of the victim's reports of abuse hinged on the "quality, the consistency, the content and the clarity," such a statement merely reiterated the common sense the jury would

apply in evaluating the credibility of the victim's testimony. *See Kojayan*, 8 F.3d at 1321 (recognizing juror's may "use their common sense in reaching a conclusion not explicitly spelled out by the evidence").

Hearsay

Gilliam asserts that the district court erred in admitting the victim's statements about the abuse through the testimony of her parents, a detective, and a social worker because these statements did not meet the statutory criteria for admission. The district court held a trustworthiness hearing outside the presence of the jury to assess the admissibility of the statements. The court determined that the challenged statements regarding the initial disclosures of the sexual abuse were spontaneous and thus contained sufficient indicia of reliability. *See* NRS 51.385(2) ("In determining the trustworthiness of a statement [by a child describing sexual abuse], the court shall consider, without limitation, whether: (a) The statement was spontaneous; (b) The child was subjected to repetitive questioning; (c) The child had a motive to fabricate; (d) The child used terminology unexpected of a child of similar age; and (e) The child was in a stable mental state."). Although the district court did not make explicit findings as to the other factors in NRS 51.385(2), there is no evidence in the record of fabrication, age-inappropriate terminology, repetitive questioning, or unstable mental condition on the part of the victim. Furthermore, the victim testified and was subjected to cross-examination at trial. Based on our review of the hearing and the district court's findings, we conclude that no relief is warranted.

Although he did not raise this objection below, Gilliam asserts that the introduction of the victim's statements through the testimony of these witnesses was also unnecessarily cumulative. We agree. Relevant

evidence "may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence." NRS 48.035(2). We have recognized that once a child victim's accusations of abuse have been "presented by one or more witnesses as to the time, the place, and the incident and any challenges to the victim's credibility are fairly met, additional hearsay allegations should be restricted." *Felix v. State*, 109 Nev. 151, 200, 849 P.2d 220, 253 (1993), *superceded on other grounds by recission of NRS 48.030(2) as stated in Evans v. State*, 117 Nev. 609, 625, 28 P.3d 498, 509-10 (2001). The accusations were presented briefly by the parents before the victim testified. Thus, the later testimony from the social worker and detective was unnecessarily cumulative. However, in light of the evidence presented, we cannot say that it amounted to plain error affecting Gilliam's substantial rights. *See Valdez,* 124 Nev. at 1190, 196 P.3d at 477.

Psychological examination

Gilliam contends that the district court erred in denying his request for an independent psychological examination of the victim. We discern no abuse of discretion. *Abbott v. State*, 122 Nev. 715, 723, 138 P.3d 462, 467 (2006) (reviewing decision regarding psychological examination for abuse of discretion). Gilliam did not demonstrate a "'compelling reason for such an examination.'" *Koerschner v. State*, 116 Nev. 1111, 1116, 13 P.3d 451, 455 (2000) (quoting *Washington v. State*, 96 Nev. 305, 307, 608 P.2d 1101, 1102 (1980)), *holding modified on other grounds by State v. Eighth Judicial Dist. Court (Romano),* 120 Nev. 613, 97 P.3d 594 (2004), *overruled by Abbott,* 122 Nev. 715, 138 P.3d 462; *Abbott*, 122 Nev. at 727, 138 P.3d at 470. Whether a compelling need for

an examination exists is determined by the consideration of three factors: (1) whether the State has called or obtained some benefit from a psychological or psychiatric expert, (2) whether the evidence of the crime "is supported by little or no corroboration beyond the testimony of the victim," and (3) whether a reasonable basis exists to believe that the mental or emotional state of the victim may have affected his or her veracity. *Koerschner*, 116 Nev. at 1116-17, 13 P.3d at 455. Here, Gilliam was convicted solely on the testimony of the victim, the State did not benefit from the testimony of a psychological expert, and Gilliam did not demonstrate a reasonable basis to believe that the victim had any underlying condition that could have affected her veracity and thus necessitate such testimony. While Gilliam pointed to factors such as a contentious divorce, inconsistent reports of abuse, or other sources of sexual knowledge, these issues were the fodder for routine cross-examination and did not demonstrate a compelling need for an examination.

Sufficiency of the evidence

Gilliam asserts that the State produced insufficient evidence at trial to support the convictions. This claim lacks merit because the evidence, when viewed in the light most favorable to the State, is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). The jury heard testimony from the victim that Gilliam routinely rubbed and placed his mouth on her chest and genital area, as well as penetrated her vagina with his penis, during the summers of 2006, 2007, 2008, and 2009. NRS 200.366(1); NRS 201.230(1). 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 the victim's testimony was more detailed than her previous statements and other factors may have cast doubt upon her account, 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).

Cumulative error

Gilliam asserts that cumulative error warrants reversal. We agree. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Hernandez v. State,* 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). There are three factors relevant to a cumulative error analysis: (1) the gravity of the crime, (2) whether the question of guilt is close, and (3) the quantity and character of the error. *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). As to the first factor, Gilliam was charged with twelve counts of lewdness with a minor under the age of 14 and six counts of sexual assault of a minor under the age of 14. He faced a potential life sentence for each of the eighteen counts. *See* NRS 201.230(2), (3)(b); 2005 Nev. Stat., ch. 507, § 27, at 2874-75 (NRS 200.366); 2007 Nev. Stat., ch. 528, § 7, at 3255-56 (NRS 200.366). Second, the question of his guilt was close. The only evidence against Gilliam was the testimony of the victim. There was no physical evidence of the abuse. Further, the victim's brother, who had slept beside her during much of the

abuse, did not wake or witness any abuse, even when the victim purportedly screamed or struck Gilliam. Third, the errors in this case worked with one another to deprive Gilliam of a fair trial. The errors, which included the admission of cumulative hearsay evidence and prosecutorial misconduct regarding facts not in evidence, bolstered the victim's testimony while the errors concerning the admission of prior bad act testimony and prosecutorial misconduct improperly assailed Gilliam's character. While we acknowledge that a defendant is not entitled to a perfect trial, *see Ennis v. State*, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975), this trial was so imperfect as to render it unfair. Accordingly, we

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

Pickering, C.J.

Gibbons, J.

Hardesty, J.

Parraguirre, J.

Douglas, J.

Cherry, J.

Saitta, J.

cc: Hon. James M. Bixler, District Judge
Clark County Public Defender
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Clark County District Attorney
Eighth District Court Clerk