IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD E. MCCALLISTER A/K/A
DONALD EDWARD MCALLISTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60166

FILED

JAN 28 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a conviction, pursuant to a jury verdict, of 6 counts of sexual assault with a child under 14 years of age and 13 counts of lewdness with a child under 14 years of age. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Appellant Donald McCallister appeals his convictions, arguing that (1) his convictions for sexual assault and lewdness violate the Double Jeopardy Clause, (2) the district court erred by admitting inadmissible hearsay, (3) the State presented insufficient evidence to support his convictions, and (4) cumulative error warrants reversal of the judgment of conviction. Because we conclude that no error occurred in this case, we affirm the judgment of conviction.[1]

[1]The parties are familiar with the facts and procedural history of this case and we do not recount them further except as necessary for our disposition.

McCallister's convictions for sexual assault and lewdness did not violate the Double Jeopardy Clause

McCallister argues that the testimony of the victim, J.B., establishes that his lewdness convictions on counts 3, 9, and 16 for rubbing J.B.'s genital area and his lewdness convictions on counts 5, 11, and 18 for licking J.B.'s testicles were acts of stimulation simultaneous with, and part of, the acts of fellatio that resulted in McCallister's sexual assault convictions on counts 2, 8, and 15. McCallister further contends that J.B.'s testimony shows that his lewdness convictions on counts 4, 10, and 17 for having J.B. rub McCallister's genitals and his lewdness convictions on counts 6, 12, and 19 for having J.B. lick McCallister's genitals were also acts of stimulation that were simultaneous with, and part of, the acts of fellatio that resulted in McCallister's sexual assault convictions on counts 1, 7, and 14. We disagree.

We review Double Jeopardy Clause challenges de novo. *Davidson v. State*, 124 Nev. 892, 896, 192 P.3d 1185, 1189 (2008). In pertinent part, NRS 200.366(1) defines sexual assault as "[a] person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or herself . . . against the will of the victim." NRS 201.230(1) defines lewdness with a child under 14 years of age as

> [a] person who willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child.

Pursuant to NRS 201.230, sexual assault and lewdness are mutually exclusive. Thus, "convictions for both based upon a single act cannot

stand." *Jackson v. State*, 128 Nev. ___, ___, 291 P.3d 1274, 1278 (2012) (internal quotations omitted).

Whether a conviction for lewdness is mutually exclusive to a conviction for sexual assault requires this court to determine whether the lewdness was incidental to or separate and distinct from the sexual assault. *See Crowley v. State*, 120 Nev. 30, 34, 83 P.3d 282, 285 (2004) (affirming defendant's conviction for sexual assault, but reversing his conviction for lewdness, because the defendant's actions of rubbing the victim on the outside and inside of his pants before performing fellatio "were not separate and distinct [but] were a part of the same episode"); *Wright v. State*, 106 Nev. 647, 650, 799 P.2d 548, 549 (1990) (holding that convictions for attempted sexual assault and sexual assault did not violate the Double Jeopardy Clause even though they arose from the same encounter and were within a short time frame because the sexual assault conviction was based on conduct that occurred after the defendant "stopped [the attempted sexual assault] and waited while a car passed").

We conclude that McCallister's lewdness convictions are separate and distinct from his sexual assault convictions. *See* NRS 200.366(1); NRS 201.230. J.B. testified that the first encounter between he and McCallister began with McCallister telling J.B. to place his hand on McCallister's penis and move it up and down. He then stopped J.B. and instructed him to place his mouth on McCallister's penis and move his head back and forth. By stopping J.B., McCallister caused these two acts to become separate and distinct. *See Wright*, 106 Nev. at 650, 799 P.2d at 549. Additionally, J.B. testified that these acts occurred "[e]asily once a week" for three years, and he identified nine other specific occurrences of sexual abuse. Thus, we conclude that a reasonable jury could have found

McCallister guilty of both lewdness and sexual assault based on J.B.'s testimony. *See Mejia v. State*, 122 Nev. 487, 493 n.15, 134 P.3d 722, 725 n.15 (2006) (stating 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)). Accordingly, we conclude the McCallister's lewdness and sexual assault convictions do not violate the Double Jeopardy Clause.

The district court did not err by admitting inadmissible hearsay

McCallister contends that the district court erred by admitting inadmissible hearsay testimony from J.B., Rebecca Yost, Detective Jerrod Kinsman, Detective Tracy Smith, Oren Galor, and Kelli Galor. We disagree. This court "review[s] a district court's decision to admit or exclude evidence for an abuse of discretion." *Ramet v. State*, 125 Nev. 195, 198, 209 P.3d 268, 269 (2009). But where testimony is not objected to at trial, we review its admission for plain error. *See Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003).

Hearsay is "a statement offered in evidence to prove the truth of the matter asserted," and it is generally inadmissible. NRS 51.053, NRS 51.065. However, an out-of-court statement that is not offered to prove the truth of the matter asserted does not invoke the hearsay rule. *See Browne v. State*, 113 Nev. 305, 312, 933 P.2d 187, 191 (1997) (concluding that statements offered "solely as foundation for [the witness's] opinion" did not violate the hearsay rule); *Wallach v. State*, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990) (holding that a statement offered for no other purpose than to demonstrate the effect it had on the listener was admissible); *Shults v. State*, 96 Nev. 742, 747-48, 616 P.2d 388, 392 (1980) (determining that testimony by police officers that they had a

conversation with a witness did not violate the hearsay rule because the officers did not divulge any specific statements and the testimony was offered merely to "explain the resulting conduct of the police"—a non-hearsay purpose).

J.B.

J.B. testified only that he told Yost about what McCallister had done to him, and the State did not elicit any more specific information from J.B. regarding his conversation with Yost. Rather, the State's next line of questioning was related to the events that happened as a result of this conversation, and McCallister did not object to this testimony at trial. We conclude that this testimony was not offered to show the truth of the matter, but rather to demonstrate J.B.'s reluctance to come forward with the allegations and to provide context to the sequence of events that followed after J.B. came forward. Therefore, we conclude that it was not plain error for the district court to admit this testimony from J.B..

Rebecca Yost

Over McCallister's objections, the district court permitted Yost to testify that J.B. identified McCallister as his abuser. The State again did not elicit any further specific information regarding Yost's conversations with J.B., but instead questioned Yost as to why she filed the police report instead of J.B. Because this testimony was also not offered for the truth of the matter asserted, but to show its effect on the listener and the progress of the investigation, we conclude that the district court did not abuse its discretion in admitting this testimony. *See Wallach*, 106 Nev. at 473, 796 P.2d at 227; *Shults*, 96 Nev. at 747-48, 616 P.2d at 392. McCallister further contests Yost's testimony that she thought that the reason J.B. did not go with her to the police to report the sexual abuse was because he was "scared and confused." This testimony

was unobjected to and we perceive no plain error by the district court in admitting it. Yost was merely stating her opinion in response to a question from the State, not testifying about any statement J.B. made to her. *See Browne*, 113 Nev. at 312, 933 P.2d at 191.

Detective Jerrod Kinsman

McCallister next argues that Detective Kinsman should not have been allowed to testify, over his objections, regarding J.B.'s reluctance to come forward with the allegations of sexual abuse. McCallister argues that this testimony had the effect of bolstering the credibility of J.B. to the detriment of his defense, resulting in plain error. We disagree. As with Yost, Detective Kinsman was testifying as to why he perceived J.B. to be a reluctant witness, not to any specific statements made to him by others. *See Browne*, 113 Nev. at 312, 933 P.2d at 191. Accordingly, we conclude that the district court did not abuse its discretion in admitted this testimony. *See Ramet*, 125 Nev. at 198, 209 P.3d at 269.

Detective Tracy Smith

McCallister contends that the district court erroneously permitted Detective Smith to testify about a criminal report received from Yost. Detective Smith testified that her involvement in the case began when Yost filed a criminal report alleging that McCallister sexually abused J.B.. After this report was filed, she contacted Detective Kinsman and requested that he interview J.B. about the allegations contained in the report. McCallister failed to object to this testimony at trial. We conclude that the district court did not commit plain error in admitting this testimony because this testimony was not offered for the truth of any matter but was offered to show the effect the report had on Detective Smith and to show the progress of the police investigation. *See Green*, 119

Nev. at 545, 80 P.3d at 94-95; *Wallach*, 106 Nev. at 473, 796 P.2d at 227; *Shults*, 96 Nev. at 747-48, 616 P.2d at 392.

Oren Galor and Kelli Galor

Finally, McCallister challenges the district court's admission of objected-to testimony from Oren Galor and Kelli Galor concerning J.B.'s statements to them about a police investigator becoming involved in the case. He argues that this testimony also had the effect of bolstering the credibility of J.B. to the detriment of his defense. The State argues that the Galors' testimony was offered to demonstrate the timing of when they learned about what happened to J.B. and J.B.'s demeanor at that time, not to prove the truth of the matter asserted. We agree and conclude that the district court did not abuse its discretion by admitting this testimony. *Ramet*, 125 Nev. at 199-200, 209 P.3d at 270; NRS 51.065.

The State presented sufficient evidence to support McCallister's convictions

McCallister argues that there was insufficient evidence to support his convictions. A conviction is supported by sufficient evidence if "'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

McCallister argues first that there was insufficient evidence to support his conviction for count 10 because J.B. did not specifically testify that he touched McCallister's genital area with his hand during J.B.'s fifth grade year. Generally, "to support multiple charges of sexual abuse over a period of time, a child victim need not 'specify exact numbers of incidents, but there must be some reliable indicia that the number of acts charged actually occurred.'" *Rose v. State*, 123 Nev. 194, 203, 163 P.3d 408, 414

(2007) (quoting *LaPierre*, 108 Nev. at 531, 836 P.2d at 58). In addition, "the victim's testimony alone is sufficient to uphold a conviction" in a sexual assault case. *Id.*

Although J.B. did not specifically testify that he touched McCallister's genital area with his hand during his fifth grade school year, he did testify that all of the sexual acts he described as occurring in the fourth grade continued through the fifth grade. Additionally, when J.B. was asked about the frequency of the sexual abuse going into the fifth grade, he responded that it was the same as it had been before. We conclude that, when viewing this evidence in light most favorable to the State, there was sufficient evidence presented for the jury to find McCallister guilty of count 10 beyond a reasonable doubt. *See McNair*, 108 Nev. at 56, 825 P.2d at 573.

McCallister next argues that there was insufficient evidence to convict him on the remaining counts because J.B.'s testimony was not particular enough.[2] In *Rose*, we stated that sexual assault victims must "testify with *some* particularity regarding the incident in order to uphold the charge." 123 Nev. at 203, 163 P.3d at 414 (internal quotations omitted). When asked how many times the sexual acts occurred, J.B. testified that they occurred at least once a week and more than ten times each year. J.B. also gave specific details as to the first sexual acts

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[2]We decline to address McCallister's argument that the victim's age at the time of his testimony affects the particularity requirement set forth in *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007), because he does not cite to any authority supporting his claim. *See Hoagland v. State*, 126 Nev. ___, ___, 240 P.3d 1043, 1046 (2010) (refusing to consider an argument when no "relevant legal or statutory analysis [was provided] to allow this court to reach a meaningful disposition of the issue").

performed with McCallister, and testified that the same series of sexual acts occurred each time McCallister assaulted him while he was in the fourth, fifth, and sixth grades. Finally, J.B. testified to at least nine specific instances of abuse, giving details such as where he was, what sexual acts were performed, and why McCallister requested that J.B. perform the sexual acts. Therefore, we conclude that J.B. testified with "some reliable indicia" such that the jury could have found the essential elements of each crime charged beyond a reasonable doubt and that sufficient evidence supported all of McAllister's convictions. *Rose,* 123 Nev. at 203, 163 P.3d at 414; *see also McNair*, 108 Nev. at 56, 825 P.2d at 573.

Cumulative error

Lastly, McCallister argues that cumulative error warrants reversal in this case. This court will not reverse a conviction unless a defendant's constitutional right to a fair trial was violated by the cumulative effect of errors, even if the individual errors are harmless. *Rose v. State,* 123 Nev. at 211, 163 P.3d at 419. In examining whether cumulative error warrants a reversal, this court considers: "'(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.'" *Id.* (quoting *Mulder v. State,* 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000)).

In addition to the serious nature of the crimes charged, we determine that the State presented ample evidence of McCallister's guilt and that McCallister's assignments of error are meritless. As a result, we conclude that McCallister's cumulative error challenge is unavailing.

Having considered McCallister's contentions and concluded that they do not warrant reversal, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Cherry

cc: Hon. Linda Marie Bell, District Judge
Law Office of Patricia M. Erickson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk