IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMUEL VERNON HAMETT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62560

FILED

DEC 16 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of sexual assault on a child under fourteen years of age and three counts of lewdness with a child under fourteen years of age. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge. Appellant Samuel Vernon Hamett raises five errors on appeal.

First, Hamett contends that the district court erred by denying his motion to dismiss and/or his motion for a directed verdict because (1) the State lost evidence of a third victim's recantation[1] due to bad faith or connivance on the part of the government and that he was prejudiced by the loss of the evidence, *see Howard v. State*, 95 Nev. 580, 582, 600 P.2d 214, 215-16 (1979), and (2) the State failed to gather the same exculpatory evidence, *see Daniels v. State*, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998). Hamett does not explain how the State could have lost evidence that it failed to gather. Regardless, Hamett is not entitled to relief under either theory.

---

[1]Charges involving this alleged victim were later dropped before the trial began.

13-38142

The third alleged victim met with the deputy district attorney more than two years before trial and recanted her accusations that Hamett sexually assaulted and/or committed lewd acts with her. According to the deputy district attorney, this conversation was not recorded. Because there is no evidence that a recording exists, Hamett cannot demonstrate that this evidence was lost. To the extent that Hamett contends that the deputy district attorney's failure to record the recantation was the result of "mere negligence, gross negligence, or a bad faith attempt to prejudice" Hamett's case, this contention also lacks merit. *Daniels*, 114 Nev. at 267, 956 P.2d at 115. Before speaking with the deputy district attorney, the third alleged victim had already made several statements to her mother, to detectives, and to the court during the preliminary hearing. Hamett fails to explain why the deputy district attorney was negligent for failing to record this subsequent statement when he already possessed the prior statements implicating Hamett. *Cf. Daniels*, 114 Nev. at 268, 956 P.2d at 115 (agreeing that "police officers generally have no duty to collect all potential evidence from a crime scene" (internal quotation marks omitted)); *State v. Johnson*, 951 A.2d 1257, 1286 (Conn. 2008) ("[P]olice do not have a duty to make a record of all interviews or interrogations with witnesses."). Furthermore, Hamett has failed to demonstrate that this out-of-court conversation would have been admissible when the third alleged victim testified as a defense witness and recanted on the stand. *See* NRS 51.065 (hearsay is generally inadmissible). Therefore, the district court did not err by denying Hamett's motions.

Second, Hamett contends that the district court erred by denying his motion to suppress a witness' testimony because she was

acting as an agent of the State when she elicited incriminating statements from Hamett after he was appointed counsel in violation of the Sixth Amendment. "The Sixth Amendment . . . imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek [the assistance of counsel]." *Maine v. Moulton*, 474 U.S. 159, 171 (1985). "A defendant is denied his Sixth Amendment right to counsel if, once the right attaches, government agents 'deliberately elicit' incriminating statements in the absence of defendant's attorney." *Simmons v. State*, 112 Nev. 91, 98-99, 912 P.2d 217, 221 (1996) (*quoting Massiah v. United States*, 377 U.S. 201, 206 (1964)). The "knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity." *Moulton*, 474 U.S. at 176.

There is little doubt that the State knowingly exploited an opportunity to confront the accused without counsel being present when the victims' stepmother called law enforcement to ask for advice about whether she should grant Hamett's request to speak with her at the jail. According to the witness, before talking with detectives she did not want to go to the jail, but after talking with them, she decided to go. Officers provided the witness with a tape recorder, arranged for her to meet face-to-face with Hamett contrary to jail policy, and positioned themselves in strategic locations around the visiting room should the operation go awry. Despite these actions by officers, both the witness and a detective testified that the State never instructed the witness to go to the jail. Upon arriving at the jail, the witness deliberately elicited an incriminating statement

when she walked into the visiting room and asked, "I just want to know why any of it took place. . .That's all I want to know."

Although the evidence arguably satisfies the deliberate elicitation and knowing exploitation prongs of the Sixth Amendment analysis, in order to obtain relief, Hamett must demonstrate that the witness was an agent of the State. *See Watson v. United States*, 940 A.2d 182, 185 (D.C. 2008) ("[T]he Sixth Amendment is not violated where the informant acts to elicit incriminating statements from a represented person on his own initiative, and not in furtherance of an express or implicit agreement with the government."). This court looks to the facts and circumstances of each case to determine whether a person is an agent of the State. *Simmons v. State*, 112 Nev. 91, 99, 912 P.2d 217, 221 (1996). The State contends that Hamett cannot demonstrate that the witness was a State agent because she was "not a paid informant of the State, a jailhouse snitch, or a co-[defendant]." Presumably, the characteristic these actors have in common is that they stand to benefit from deliberately eliciting incriminating information. The State's argument assumes that this witness had nothing to gain by eliciting incriminating evidence that could be used by the State in prosecuting the man she believed molested her stepdaughters. We conclude that it is a close question whether the witness was acting on her own initiative or in furtherance of an implicit agreement with the State.

Even if we assume, without deciding, that Hamett was denied his Sixth Amendment right to counsel because the witness was a State agent, we conclude that this error was harmless beyond a reasonable doubt because substantial independent evidence corroborated the victims' compelling testimony. Hamett told detectives during his first interview at

his home that he had a problem with "inappropriate touching" and during a recorded interview at the jail that, "I touched my girls inappropriately." Hamett also told his wife during a recorded phone conversation that some of the allegations against him were true and in a separate conversation that, "it happened one time." We conclude that consideration of the additional testimony of the victims' stepmother that Hamett told her that "he put his hand down the front of [one victim's] pants" and "all he did was rub their pussies and that was it," was harmless beyond a reasonable doubt. *See Valdez v. State*, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008). Therefore, Hamett is not entitled to relief on this claim.

Third, Hamett contends that the district court erred by allowing the State to play redacted portions of his two jailhouse phone calls to his wife rather than requiring the State to play longer portions of the recordings. The trial transcript reveals that Hamett was told by the district court that if Hamett "wants us to play the entire portion as opposed to the redacted portion, I don't have any objection to that." Hamett instead chose to use the redacted portions to his advantage by arguing to the jury during closing that it should not consider the recorded conversations as confessions to Hamett's wife because "there was no context" and the redacted portions were "cherry-picked" and therefore not reliable. Hamett now argues that NRS 47.120 required the district court to introduce other portions of the recorded statements sua sponte. However, Hamett cites no authority for the proposition that the language "the party *may* be required" places an affirmative obligation on the district court to introduce other portions of the statements sua sponte. NRS 47.120 (emphasis added). Furthermore, Hamett has not provided this court with either of the jailhouse phone calls in their entirety so that we

can evaluate the merits of Hamett's claim that the redacted portions were misleading. For these reasons, we conclude that Hamett is not entitled to relief on this claim.

Fourth, Hamett contends that the State committed prosecutorial misconduct by telling the jury that, "[w]e could have come in here and probably charged hundreds, hundreds of counts." Hamett immediately objected to this comment, telling the court that, "I think we should stick with the counts that we have." The district court responded by telling Hamett, "I agree. Legally, you charged the counts you could charge." Hamett contends that the district court's comment exacerbated the State's error by implying that the State's allegation was factually correct but that there were "legal" reasons that the State could not bring the other hundreds of charges. "When considering claims of prosecutorial misconduct, this court engages in a two-step analysis. First, we must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, we must determine whether the improper conduct warrants reversal." *Valdez*, 124 Nev. at 1188, 196 P.3d at 476. (footnotes omitted). We agree that the State's conduct was improper and the district court erred by failing to admonish the jury to disregard the State's comment. However, we conclude that these comments were harmless. *See id.* at 1188-89, 196 P.3d at 476. One of the two victims testified that she saw Hamett almost every day at his house for several years and that Hamett would touch her vagina, "almost every time" she went to his house. Therefore, it is likely that the jury believed the State was referring to these incidents of touching rather than some other uncharged acts that were unrelated to the testimony of the witnesses. We conclude that Hamett is not entitled to the reversal of his conviction based on this claim.

Fifth, Hamett contends that cumulative error warrants reversal. "When evaluating a claim of cumulative error, we consider the following factors: (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." *Valdez*, 124 Nev. at 1195, 196 P.3d at 481 (internal quotation marks omitted). Having considered these factors we conclude that the cumulative effect of any errors does not entitle Hamett to the reversal of his convictions, and we

ORDER the judgment of conviction AFFIRMED.

Pickering, C. J.
Pickering

Hardesty, J.
Hardesty

Cherry, J.
Cherry

cc: Hon. Robert W. Lane, District Judge
Christopher R. Arabia
Nye County District Attorney
Attorney General/Carson City
Nye County Clerk