IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD FINLEY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36096

FILED

OCT 08 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of one count of sexual assault of a child under the age of fourteen. The district court sentenced appellant, Edward Finley, to life in prison with the possibility of parole after twenty years.

Finley first contends that the district court erred by failing to conduct a hearing before trial to determine whether the child-victim in this case was competent to testify. "A child witness is competent to testify if the child has the capacity to receive just impressions and possesses the ability to relate to them truthfully."[1] "Although courts must evaluate a child's competence on a case-by-case basis, some relevant factors to be considered include: (1) the child's ability to receive and communicate information; (2) the spontaneity of the child's statements; (3) indications of 'coaching' and 'rehearsing;' (4) the child's ability to remember; (5) the child's ability to distinguish between truth and falsehood; and (6) the likelihood that the child will give inherently improbable and incoherent testimony."[2] Nothing in the record suggests that the child-victim in this case was not a competent witness. Not only did the child-victim demonstrate an understanding of the distinction between the truth and a lie at trial, but she consistently indicated that Finley subjected her to penile penetration. Accordingly, we conclude that the district court's failure to conduct a competency hearing was not plain error.

Finley also contends that several instances of prosecutorial misconduct denied him a fair trial. Specifically, Finley states that during

[1]Koerschner v. State, 116 Nev. ____, 13 P.3d 451, 456 (2000).

[2]Id.

opening statements the prosecutor made improper references to drug use by Finley and informed the jury that the child-victim had made numerous prior consistent statements. Additionally, Finley argues that during closing arguments the prosecutor improperly made sarcastic comments about Finley's actions, invoked sympathy from the jury by suggesting that the child-victim had a difficult life, and implied that the State only prosecutes guilty people.

"[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial."[3] If the issue of guilt or innocence is close, and if the State's case is not strong, prosecutorial misconduct will probably be considered prejudicial.[4] However, where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may be harmless error.[5]

Finley did not object at trial to any of the above comments except the prosecutor's comment concerning his drug use. Thus, Finley has waived this issue on appeal. Further, the alleged instances of prosecutorial misconduct are not of a quantity requiring review for plain error.[6] Additionally, we conclude that the prosecutor's comment about Finley's drug use was not improper because evidence of bad acts or other crimes so closely related to an act in controversy that a witness cannot describe the crime charged without referring to the other acts or crimes is admissible at trial.[7] Here, evidence of Finley's admitted drug use at the time of the molestation was an integral part of his version of events and was his reason for failing to remember the incident with much specificity.

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[3]United States v. Young, 470 U.S. 1, 11 (1985).

[4]Garner v. State, 78 Nev. 366, 374, 374 P.2d 525, 530 (1962).

[5]Jones v. State, 113 Nev. 454, 937 P.2d 55 (1997).

[6]Williams v. State, 103 Nev. 106, 110-11, 734 P.2d 700, 703 (1987) (objection necessary to preserve for appellate review allegations of prosecutorial misconduct in closing argument); see also DeJesus v. Flick, 116 Nev. 812, 7 P.3d 459 (2000) (civil case reviewing unobjected-to instances of attorney misconduct during closing argument because of the sheer quantity of such comments).

[7]See NRS 48.035(3).

Accordingly, we conclude that the evidence was admissible and that the district court did not abuse its discretion by refusing to grant Finley's motion for a mistrial.

Finley next contends that he was denied a fair trial because references to his custodial status when he was first contacted by police about allegations that his daughter had been molested raised an inference of guilt in the juror's minds and unfairly prejudiced him. Finley argues that Detective Scott made an improper reference during his testimony to receiving a "kite" which suggested to the jury that Finley was incarcerated. Additionally, Finley argues that his statement to Detective Scott was not properly redacted and that the jury heard numerous references to his pretrial custodial status which suggested that he was guilty.

The rule that one is innocent until proven guilty means that a defendant is entitled to not only the presumption of innocence, but also to the indicia of innocence.[8] "Informing the jury that a defendant is in jail raises an inference of guilt, and could have the same prejudicial effect as bringing a shackled defendant into the courtroom."[9] Trial errors such as improper references to the defendant's in-custody status are subject to harmless error analysis.[10]

With regard to Detective Scott's reference to receiving a "kite," the record reveals that the brief remark was made spontaneously during the State's direct examination of Detective Scott. Moreover, the prosecutor did not solicit the remark from Detective Scott, and she in fact stopped him from further comment by immediately moving on to other questions. Finally, there is nothing in the record indicating that the jury inferred that Finley was incarcerated from Detective Scott's remark.

With regard to his recorded statement to police, Finley has failed to include in the record on appeal either the audio tape or a transcript of the redacted version of the statement that was played for the

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[8]Haywood v. State, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991) (citing Illinois v. Allen, 397 U.S. 334 (1970)).

[9]Id. at 288, 809 P.2d at 1273.

[10]Id.

jury in this case. Thus, he has precluded meaningful appellate review.[11] Additionally, the State redacted numerous references to Finley's custodial status from the statement before presenting it to the jury, including the references objected to by Finley's counsel. Nothing in the record suggests that the State acted in bad faith in its redaction efforts, and Finley's counsel had the opportunity to review the statement prior to its admission at trial. Accordingly, we conclude that Finley's contention lacks merit.

Finley further contends that the admission of certain testimony concerning telephone threats he allegedly made was plain error because: (1) a Petrocelli hearing was not held prior to its admission; (2) the evidence was irrelevant, highly inflammatory and prejudicial; and (3) its admission deprived him of a fair trial.[12] Finley argues that the testimony was improper character evidence tending to show that he had a propensity to commit the crime charged which should not have been admitted at trial.

Generally, evidence of other crimes or bad acts cannot be admitted at trial solely for the purpose of proving that a defendant has a certain character trait and acted in conformity with that trait on the particular occasion in question.[13] However, evidence of a prior bad act may be admitted for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident."[14] Before evidence of a prior bad act can be admitted, the district court must determine, outside the presence of the jury, that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.[15]

The district court has the discretion to admit or exclude evidence, including prior bad acts, and the district court's determination

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[11]See NRAP 30(b) (requiring appendix to include portions of the record essential to determination of issues raised in appeal).

[12]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

[13]NRS 48.045(1).

[14]NRS 48.045(2).

[15]Tinch v. State, 113 Nev. 1170, 1175-76, 946 P.2d 1061, 1064-65 (1997).

will be given great deference and will not be overturned absent an abuse of discretion.[16] Additionally, although failure to conduct an on-the-record hearing may deprive this court of the opportunity for meaningful review of the district court's admissibility determination, the failure to conduct the proper hearing on the record does not mandate reversal in all cases.[17] The district court's failure to conduct a proper hearing is cause for reversal on appeal unless: (1) the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of bad acts evidence as set forth in Tinch; or (2) the result would have been the same if the district court had not admitted the evidence.[18]

At trial, Finley did not object to either Willie Lewis' or Pam McCoy's testimony concerning telephone threats Finley allegedly made to them. Thus, he has waived this issue on appeal.[19] Nonetheless, even if the testimony was erroneously admitted, reversal is not mandatory in this case because we conclude that the result would have been the same if the district court had not admitted the evidence. Specifically, the child-victim testified that Finley penetrated her vagina with his penis. Detective Scott and Michelle Belkin corroborated her allegations, testifying to the child's prior consistent statements about Finley's molestation of her. The child's grandmother also testified that she was very upset about visiting her father shortly after the molestation allegedly occurred. Additionally, the medical evidence, establishing that the child's hymen was damaged, was consistent with a penetrating injury. Finally, although he minimized his actions, Finley admitted molesting his daughter in his August 6, 1999, statement to Detective Scott. Accordingly, we conclude that any error was harmless.

Finally, Finley contends that he was denied his statutory right to review and respond to the pre-sentencing investigation (PSI) report and that the district court abused its discretion by refusing to continue his sentencing hearing.

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[16]Petrocelli, 101 Nev. at 52, 692 P.2d at 508.

[17]Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998).

[18]Id.

[19]Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992) (in general, failure to object below precludes appellate review).

A criminal defendant must be given a copy of a PSI report and afforded an opportunity to object to factual errors in any such report and to comment on any recommendations.[20] However, as "long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence, this court will refrain from interfering with the sentence imposed" by the district court.[21]

In this case, Finley was convicted of sexual assault with a child under the age of fourteen.[22] When the victim of sexual assault is under the age of fourteen but the crime did not result in substantial bodily harm to the child, NRS 200.366(3)(c) provides that the offender shall be punished by imprisonment in the state prison for life with the possibility of parole with eligibility for parole beginning when a minimum of 20 years has been served.[23] As the language of the statute is mandatory, the district court was required to sentence Finley to a life term. Thus, although Finley was entitled to an opportunity to review and respond to the PSI report, Finley was not prejudiced by the district court's ruling denying his motion to continue because a life sentence was mandatory under the statute and thus would have been imposed regardless of whether there was a continuance of the hearing. Further, the district court was not required to grant Finley's request for a continuance.[24] Accordingly, we conclude that Finley is not entitled to a new sentencing hearing.

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[20]NRS 176.156; see also Shields v. State, 97 Nev. 472, 473, 634 P.2d 468, 469 (1981) (persons convicted of crime should have opportunity to make informed comments on all factual assertions in PSI report).

[21]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

[22]See NRS 200.364; NRS 200.366.

[23]NRS 200.366(3)(c); see also Botts v. State, 109 Nev. 567, 568, 854 P.2d 856, 857 (1993).

[24]Mulder v. State, 116 Nev. 1, 992 P.2d 845 (2000) (granting or denying motion for a continuance is within sound discretion of district court).

Having considered Finley's contentions and concluded that they lack merit, we therefore

ORDER the judgment of conviction AFFIRMED.

Young, J.
Young

Leavitt, J.
Leavitt

Becker, J.
Becker

cc: Hon. Jeffrey D. Sobel, District Judge
Attorney General
Clark County District Attorney
JoNell Thomas
Clark County Clerk