IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL T. WILLIAMS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36414

ORDER OF AFFIRMANCE

This is an appeal from a conviction of three counts of sexual assault with a minor under fourteen years of age, one count of sexual assault with a minor under sixteen years of age, and one count of attempt sexual assault with a minor under sixteen years of age. The district court sentenced appellant Michael T. Williams to serve concurrent terms of life with the possibility of parole after twenty years for the three counts of sexual assault with a minor under fourteen years of age, a consecutive term of life with the possibility of parole after twenty years for the sexual assault with a minor under sixteen years of age count, and 96 to 240 months for the attempt count, to be run concurrent with sexual assault with a minor under sixteen years of age count.

Williams now appeals, asserting that the district court abused its discretion by: (1) permitting the State to introduce hearsay statements by witnesses; (2) failing to conduct a trustworthiness hearing to assess a minor victim's testimony; (3) refusing to sever counts involving two different victims and conduct that occurred at different times; and (4) granting two continuances and allowing defense counsel to withdraw.

Having considered all of the appellant's contentions, we conclude that this appeal lacks merit.

First, Williams contends that, despite his failure to object at trial, the district court abused its discretion when it allowed several witnesses to provide hearsay testimony regarding statements made by the minor victims. Furthermore, Williams contends that the hearsay testimony of all the witnesses cumulatively affected Williams' substantial rights.

We have held that when an appellant fails to object to testimony elicited at trial, "we [will] not consider his contention a proper assignment of error."[1] However, if the district court's failure to recognize "plain error" affects Williams' substantial rights, it may be noticed.[2]

A judgment should not be set aside or a new trial granted on the ground of improper admission of evidence, unless such error has resulted in a miscarriage of justice, or has actually prejudiced the defendant in respect to a substantial right.[3] In addition, we will not set aside a district court's decision whether to admit evidence absent an abuse of discretion.[4] A review of the record indicates that even if Williams had objected, the district court did not abuse its discretion by admitting the testimony.

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[1]Green v. State, 113 Nev. 157, 176, 931 P.2d 54, 65-66 (1997) (reversed on other grounds) (quoting Wilson v. State, 86 Nev. 320, 326, 468 P.2d 346, 350 (1970).

[2]NRS 178.602.

[3]State v. Rampage, 51 Nev. 82, 87, 269 P. 489, 490 (1928).

[4]Koerschner v. State, 116 Nev. 1111, 1120, 13 P.3d 451, 457 (2001).

Williams contends that the testimony of one of the minor victim's friends was inadmissible as hearsay because the friend merely testified as to the minor victim's statement that Williams tried to "touch her," without any evidence that such statement was made under the stress of excitement. The friend testified that the minor victim was crying and visibly upset when she described the attempted sexual assault that occurred immediately prior to the victim's arrival at her home. This court has held that testimony by a witness repeating the victim's description of what occurred during the sexual assault was admissible as an excited utterance, since minutes after the assault the witness observed the victim agitated and nervous.[5] Accordingly, the friend's testimony repeating the minor victim's description of the attempted assault was admissible as an excited utterance.

As to the testimony of Ayannia Galvin, the first minor victim's cousin, and Brenda Hinch, the first minor victim's mother, the district court's admission of this evidence was improper because their testimony was hearsay. Galvin provided testimony that the minor victim informed her that Williams was attempting to touch her. Hinch testified that she was initially hesitant, but decided to help Williams return to Nevada so that she could question him about the allegation that he improperly touched her daughter. She also testified regarding statements her daughter made to her regarding the sexual assault. The State concedes that Galvin's testimony was hearsay, but contends that the reason for providing Hinch's testimony was not for its truth, but to show Hinch's reason for being hesitant in assisting Williams. However, the State fails

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[5]Dearing v. State, 100 Nev. 590, 592, 691 P.2d 419, 420 (1984).

to explain how this evidence is relevant to the crimes with which Williams was charged.

While the admission of this evidence was improper, any error that does not substantially affect Williams' rights must be disregarded.[6] We conclude that the admission of this evidence did not substantially affect Williams' rights in light of the overwhelming evidence of Williams' guilt properly admitted into evidence.

Williams further maintains that the testimony of Ida Galvin, Dorothy McNair, Stephanie Hooks, Officer John Chelini and Officer Kristin Meegan was all inadmissible hearsay and cumulatively deprived Williams of his substantial rights. Evidence was adduced that the second victim ran into her room, fearful and rubbing her eyes when she told Galvin what occurred. McNair and Hooks testified as to statements made to them by Galvin, who was hysterical at the time. Similar to the testimony of Howard, these statements were admissible as excited utterances.

The officers testified as to statements made to them by the second minor victim. Williams argues that this court's decision in Gibbons v. State requires a reversal of Williams' convictions.[7] In Gibbons, this court determined that the improper admission of the victim's hearsay statements to two police matrons warranted a reversal. The statements had been offered under the "res gestae" exception but were held by this court not to be admissible under any exception characterized as "res gestae." Because the State's case depended entirely on the credibility of

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[6]NRS 178.598.

[7]97 Nev. 299, 629 P.2d 1196 (1981).

the victim, the court declined to call the admission of the victim's hearsay statements harmless.[8] Here, the error, if any, does not require a reversal because the prosecution's case relies on overwhelming evidence against Williams in addition to the minor victim's testimony. While the officers' testimony against Williams was repetitive, we conclude that the admission of such evidence was harmless given its consistency with the minor victim's statements to other witnesses.

Next, Williams argues that under NRS 51.385, the district court should have conducted a trustworthiness hearing prior to admitting child testimony. NRS 51.385 provides that a statement made by a child under ten years of age that describes any act of sexual conduct performed with the child requires a trustworthiness hearing outside the presence of the jury.

In Braunstein v. State,[9] we recently held that the failure to hold a trustworthiness hearing under NRS 51.385 does not warrant automatic reversal and that error from the failure to hold a hearing is subject to a harmless error analysis. Furthermore, we held that when applying a harmless error analysis, the major question when considering hearsay statements admitted without a trustworthiness hearing is whether or not the child to whom the statements are attributed testified at trial.

Here, we conclude that the district court erred by failing to hold a trustworthiness hearing. Nevertheless, such error was harmless in light of other indications of the reliability of the minor's statements. The

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[8]Gibbons, 97 Nev. at 302, 629 P.2d at 1197.

[9]118 Nev. ____, ____ P.3d ____ (Adv. Op. No. 8).

minor made statements to Ida Galvin immediately following the incident with Williams. The statements made to Galvin were consistent with statements the minor made to Officer John Chelini and Officer Kristin Meegan. The minor testified that she ran into Galvin's room just after the incident and was afraid. This emotional condition seems consistent under the circumstances and also supports her credibility. There was also evidence that while in jail Williams confessed to another inmate, Melvin Royal. In addition, the minor victim was fully cross-examined by defense counsel, and Williams was provided the opportunity to test her credibility concerning her statements.

Williams alleges that the counts involving the sexual assault against the minor victims were improperly joined. "[J]oinder decisions are within the sound discretion of the trial court and will not be reversed absent an abuse of discretion."[10] This court has previously held that when a defendant used identical modus operandi in luring his victims, the identical circumstances of the crimes and the closeness in time of the acts satisfied the criterion of a common scheme or plan.[11] Contrary to Williams' contention, the assaults of the two victims are very similar. In both instances, Williams took steps to develop a sense of trust with the families involved. He managed to arrange time alone with the minor victims, spending the night at one residence regularly and another on occasion. In addition to the crimes being sexual in nature, they are both

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[10]Robins v. State, 106 Nev. 611, 619, 798 P.2d 558, 563 (1990) (citing Lovell v. State, 92 Nev. 128, 132, 546 P.2d 1301, 1303 (1976)).

[11]Shannon v. State, 105 Nev. 782, 786, 783 P.2d 942, 944 (1989).

crimes against children. Therefore, the district court did not abuse its discretion when it joined all counts against Williams.

Finally, Williams argues that his right to a speedy trial was violated because two appointed defense counsels were permitted to withdraw. We disagree. The decision to grant a continuance is within the sound discretion of the trial court and will not be disturbed absent a showing of clear abuse.[12]

Here, one appointed defense counsel was permitted to withdraw because she had become aware that two witnesses expected to testify for the State at trial were represented by the public defender's office. A second attorney was permitted to withdraw because he had a conflict in that a relative was related to the prosecutor assigned to Williams' case. Williams' trial was delayed for four months as a result, and during that time, Williams allegedly wrote letters to the mothers of the victims, in an attempt to prevent the children from testifying. Williams claims he was prejudiced by this four month delay.

When determining whether the right to a speedy trial has been violated, a court must consider the "length of [the] delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[13] Here, all four factors weigh in favor of the district court's decision. The delay was only four months and clear conflicts justified the delays. The only prejudice Williams clearly describes is that the State was able to obtain copies of damaging letters written by Williams during that period. Williams was not prejudiced by the four month delay, but was

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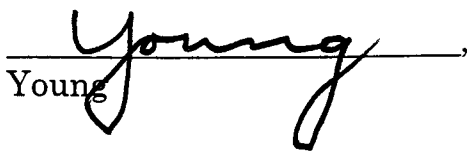
[12]Doyle v. State, 104 Nev. 729, 731, 765 P.2d 1156, 1157 (1988).

[13]Barker v. Wingo, 407 U.S. 514, 530 (1972).

actually prejudiced by his own act in writing the letters to the mothers of the victims. Therefore, we conclude that there was good cause for the district court's granting of two continuances, and that there was no abuse of discretion.

After reviewing the record on appeal, we conclude that none of Williams' arguments have merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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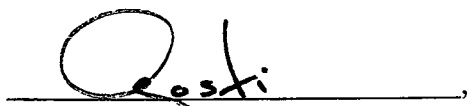
Young



_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Sally L. Loehrer, District Judge
Attorney General
Christopher R. Oram
Clark County District Attorney
Clark County Clerk