

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GRADY LEE FISHER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 66974

FILED

FEB 17 2016

FRANK L. 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 three counts of sexual assault, five counts of lewdness with a child under 14 years of age, four counts of open or gross lewdness, and two counts of sexual assault on a child under 14 years of age. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

Grady Fisher contends the evidence presented at trial was insufficient to support his convictions. In addition to generally challenging all convictions, he also specifically contends the State failed to prove the "open" element of open and gross lewdness for count 5, because there was no evidence to support that the lewd act was done in a non-secretive manner; count 9, because there was no evidence anyone else was around; and count 14, because the touching occurred on private property in a remote area and the State failed to demonstrate this was a "public place" or that the event occurred in a private place in the presence of another person. He also contends the victim, SC, did not testify with sufficient particularity regarding the duration or frequency of the acts to support the conviction for count 11 (lewdness with a child under 14 years of age) or for count 13 (open or gross lewdness). We disagree.

When reviewing a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the prosecution and determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). “[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness.” *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975).

“[T]he victim’s testimony alone is sufficient to uphold a conviction” for sexual assault; however, “the victim must testify with some particularity regarding the incident.” *Rose v. State*, 123 Nev. 194, 203, 163 P.3d 408, 414 (2007) (quoting *LaPierre v. State*, 108 Nev. 528, 531, 825 P.2d 56, 58 (1992)). “[T]o 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.’” *Id.* To prove open or gross lewdness it is not necessary to prove that the act occurred in a public place or that the act was observed by others, “the fact that an act is committed openly is sufficient for the fact-finder to conclude that there was a likelihood that the act would be observed and that it would be offensive to observers.” *Berry v. State*, 125 Nev. 265, 280-81, 212 P.3d 1085, 1095-96 (2009), abrogated on other grounds by *State v. Castaneda*, 126 Nev. 478, 482 n.1, 245 P.3d 550, 553 n.1 (2010).

Testimony was presented that the victims, KH, MH, and SC, spent one to two weeks every summer at their grandparents’ home. KH and MH also sometimes stayed at their grandparents’ home after school, on weekends, and during spring break. Grady Fisher is the victims’ step-

grandfather and was the individual the victims spent the most time with during their visits, because their grandmother worked a graveyard shift and slept during the day.

KH testified that starting around the age of six Fisher would make her come sit next to him on the couch, then he would put a blanket over her and stick his hands down her pants and touch her vagina. In addition to touching her vagina, he would also digitally penetrate her. She testified that this happened multiple times when she was multiple ages. KH testified that there were also times Fisher would reach up and touch her breasts and there were multiple times he would make her touch his penis. She also testified that Fisher made her go into the back bathroom and perform fellatio on him on multiple occasions. After her sixteenth birthday, Fisher had sexual intercourse with KH against her will in her grandmother's room. We conclude this evidence was sufficient to support the convictions for three counts of sexual assault (counts 1-3), one count of lewdness with a child under 14 years of age (count 4), and one count of open or gross lewdness (count 5). See NRS 200.366(1); NRS 201.210; NRS 201.230(1).

MH testified regarding a specific instance when Fisher made her sit on his lap in the living room and he touched her breasts and vagina. She testified Fisher touched her like this a lot of days and sometimes twice a day. Sometimes Fisher would put a blanket on her and touch her. MH testified that sometimes Fisher would wake her up, take her into the living room, and have her lie down next to him. Fisher would then touch her breasts and vagina and he would digitally penetrate her. At other times, Fisher would lie next to MH when she was sleeping in her grandmother's bed and touch her breasts and vagina. MH also testified


regarding another specific instance when she was in a horse trailer with Fisher and he pulled her down onto his lap and he touched her breasts and vagina. We conclude this evidence was sufficient to support the convictions for one count of sexual assault on a child under 14 years of age (count 6), two counts of lewdness with a child under 14 years of age (counts 7 and 8), and one count of open or gross lewdness (count 9). See NRS 200.366(1); NRS 201.210; NRS 201.230(1).


SC testified she remembered that starting when she was about eight years old Fisher would make her sit on his lap in the living room and he would rub her stomach and then move his hand up to her chest. When she tried to get away, Fisher would hold her. SC also testified to a specific instance when she was twelve years old and she asked if she could play a computer game and Fisher responded "Only if I get to play with you first." When SC said she did not want to play the game, Fisher made her come over to him and sit on his lap. Fisher then rubbed SC's stomach, moved his hand down into her pants, and digitally penetrated her. SC testified that Fisher touched her vagina on a couple of times with skin-to-skin contact, however, this was the only time he penetrated her. Every time he would touch SC's vagina it was the same routine, Fisher would have her sit on his lap and he would start rubbing her stomach. SC would fidget and try to get away, but when she stopped fidgeting and tried to relax, Fisher would move his hand down into her pants. SC testified that Fisher touched her chest and butt more often. SC also testified that Fisher would rub her butt and touch her chest when she would go with him to feed the horses. She said at these times he touched her when they were behind the horse trailer because that area could not be seen from the house. We conclude this testimony was sufficient to

support the convictions for one count of sexual assault on a child under 14 years of age (count 10), two counts of lewdness with a child under 14 years of age (counts 11 and 12), and two counts of open or gross lewdness (counts 13 and 14). See NRS 200.366(1); NRS 201.210; NRS 201.230(1). Accordingly, we

ORDER the judgment of conviction AFFIRMED.¹


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Alvin R. Kacin, District Judge
Elko County Public Defender
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk

¹To the extent Fisher alleges the information was deficient, this claim is not supported by cogent argument or relevant authority and we, therefore, decline to address it. See *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).