IN THE SUPREME COURT OF THE STATE OF NEVADA

FELIPE LAZOS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37079

FILED

MAY 14 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, for four counts of lewdness with a child under the age of fourteen years and one count of sexual assault of a minor under fourteen years of age. The district court sentenced appellant to a term of life with parole eligibility beginning after twenty years for the sexual assault count, and to a term of 48-120 months for each of the four lewdness counts. All sentences were to run consecutively.

Appellant was charged with various counts of sexual assault and lewdness for conduct involving his two young granddaughters. Appellant raises numerous claims of error in this appeal, all of which we conclude lack merit.

Sufficiency of evidence

First, appellant contends that there was insufficient evidence for the jury to have found him guilty of sexual assault and the four counts of lewdness. We disagree.

"The standard of review for sufficiency of evidence upon appeal is whether the jury, acting reasonably, could have been convinced

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of the defendant's guilt beyond a reasonable doubt."[1] We have previously held that "[w]here there is substantial evidence to support the jury's verdict, [the verdict] will not be disturbed on appeal."[2] We have also held that "it is exclusively within the province of the [jury] to weigh evidence and pass on the credibility of witnesses and their testimony."[3]

Appellant's argument is premised on the absence of specific dates on which the alleged acts occurred and inconsistencies between the victims' trial testimony and prior statements. In Cunningham v. State,[4] we held that "[u]nless time is an essential element of the offense charged, there is no absolute requirement that the state allege the exact date."[5] Because time was not an element of sexual assault, the state was not required to allege the exact dates that the acts occurred.[6] We therefore reject appellant's contention that, since the specific dates of the acts were not alleged, there was insufficient evidence. Appellant also relies on LaPierre v. State[7] to support his contention that the evidence was insufficient because of inconsistencies between the victims' in-court

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[1]Smith v. State, 112 Nev. 1269, 1280, 927, P.2d 14, 20 (1996) (quoting Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992) (receded from in Byford v. State, 116 Nev. 215, 231, 994 P.2d 700, 711 (2000))).

[2]Id.

[3]Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994)

[4]100 Nev. 396, 683 P.2d 500 (1984).

[5]Id. at 400, 683 P.2d at 502.

[6]Id.

[7]108 Nev. 528, 836 P.2d 56 (1992).

testimony and the prior statements the girls gave police. We conclude that this reliance is misplaced because in LaPierre, we reiterated that the "testimony of a sexual assault victim alone is sufficient to uphold a conviction" provided that the victim testifies as to the incident with some particularity.[8] We recognized that "it is difficult for a child victim to recall exact instances when the abuse occurs repeatedly over a period of time."[9]

Appellant's older granddaughter testified as to three incidents which allegedly occurred while appellant was babysitting her and her younger sister in his home. She testified as to where she was located within appellant's house when each of the acts occurred; what she was doing; what she was wearing; her age or grade level during each incident; and as to the manner in which appellant touched her. In addition, she testified about what appellant was wearing during one of the incidents, and about the threats appellant made to her if she disclosed what he did. Appellant was convicted of one count of lewdness relating to this child.

Appellant's younger granddaughter related an incident in which appellant inserted his finger in her rectum. She testified that she was five or six years old when the act occurred, and that she was sleeping in appellant's living room floor next to her sister. She also testified that she knew it was his finger because she felt his fingernail. Further, she testified that several days after the first incident, appellant touched her with his penis "in between [her] butt cheeks" while she laid on his living room floor. She testified that appellant inserted his finger in her rectum

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[8]Id. at 531, 836 P.2d at 58.

[9]Id.

or put his penis in between her buttocks "a lot" and elaborated as to how appellant touched her.

The jury also heard a tape of each victim's interview with the police where they disclosed the abuse. The older granddaughter's foster mother testified about how the girl disclosed the abuse. The foster mother also testified that the girl subsequently began having nightmares and later disclosed the abuse to her biological parents, her social worker and her therapist.

We conclude that considered in the light most favorable to the prosecution, the jury had more than sufficient evidence to convict appellant of the crimes for which verdicts were rendered.

Psychological examinations

Appellant next contends that the district court erred in refusing to allow him to have the victims undergo psychological examinations. We disagree.

In Keeney v. State,[10] we held that whether to grant a psychological exam upon a defendant's request is within the sound discretion of the judge.[11] We also stated that:

> it would be error to preclude a defendant from having an alleged child-victim examined by an expert in psychiatry or psychology if: (1) the State has employed such an expert; (2) the victim is not shown by compelling reasons to be in need of protection; (3) evidence of the crime has little or no corroboration beyond the testimony of the victim;

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[10]109 Nev. 220, 850 P.2d 311 (1993) (overruled on related grounds by Koerschner v. State, 116 Nev. 1111, 1116, 13 P.3d 451, 455 (2000).

[11]Keeney, 109 Nev. at 226, 13 P.3d at 315.

> and (4) there is a reasonable basis for believing that the victim's mental or emotional state may have affected his or her veracity.[12]

In Koerschner v. State,[13] we reiterated the factors in Keeney, and held that to the extent the second factor in Keeney shifted the burden to the State, it was overruled.[14]

Here, the district court held a hearing on the issue, during which the state informed the district court that it had no plans to employ such an expert. We conclude that the district court properly denied the request, after noting that the state was not employing such an expert.

Discovery issue

Appellant also claims that the district court erred in denying discovery of previously requested documents. During a pretrial hearing, appellant's counsel asked for discovery of various items, including any psychological reports on either victim. The State opposed the request, noting it had no such information and also arguing that this information would be privileged. The district court later ruled that appellant was not entitled to the victims' psychological reports or reports from their counselors or therapists. On the eve of the last day of trial, the defense issued a supplemental notice of witnesses listing two doctors who were to testify about reports recently obtained by appellant. The State argued that the reports obtained were privileged, and that they had been provided by Mojave Mental Health in error. Appellant claimed that any privilege

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[12]Id.

[13]116 Nev. at 1116, 13 P.3d at 455.

[14]Id.

was waived, and that the reports were "impeachment material." The district court ruled that the documents were privileged under NRS 49.207 through 49.213 and that the negligent production of the documents by the clinic did not constitute waiver. The district court then ordered appellant to refrain from utilizing the reports in any manner.[15] We conclude that absent valid waiver,[16] the district court properly denied appellant's use of this privileged information.

Vindictive prosecution

Appellant next claims that the district court erred in denying his motion to dismiss for vindictive prosecution. Appellant argues that the State sought a grand jury indictment on charges relating to the younger granddaughter in retaliation for his rejection of the plea agreement on the charges involving his older granddaughter. He claims that the second indictment was based on information known to the State at the time of the original charges, and that the absence of any new information evidences the vindictive nature of the second indictment. We disagree.

In Bordenkircher v. Hayes,[17] the United States Supreme Court differentiated between plea bargaining, which involves give-and-take negotiation, and instances where a penalty is unilaterally enhanced

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[15]The district court was not asked to perform an in camera review and was not informed that the documents contained exculpatory evidence, as appellant now alleges. Appellant now claims that the reports contained evidence about allegations that the girls' father may have been molesting their younger brother.

[16]See NRS 49.385 and NRS 49.395.

[17]434 U.S. 357 (1978).

because a defendant chooses "to exercise a legal right to attack his original conviction."[18] The Supreme Court also held that the Due Process Clause is not offended even when the additional charges brought are based on information known to the prosecution at the time of the plea negotiations.[19]

Here, the state was forthright with appellant about its desire to spare the younger child from testifying, and its intention to pursue the additional indictment if an agreement could not be reached on the original charges. We conclude that the motion to dismiss for vindictive prosecution was thus properly denied.

Joinder issue

Appellant further claims that the district court erred in granting the State's motion to consolidate the two cases or in admitting evidence of the alleged crimes relating to the younger child in the case involving the older child.

NRS 173.115 permits joinder of multiple offenses into one information when the offenses are "[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan." We have previously held that "[j]oinder is within the discretion of the trial court and its action will not be reversed absent an abuse of discretion."[20] In addition, NRS 48.045(2) provides that evidence of other crimes, wrongs or acts may be admitted "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake."

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[18]Id. at 362.

[19]Id. at 359.

[20]Lovell v. State, 92 Nev. 128, 132, 546 P.2d 1301, 1303 (1976).

Appellant was alleged to have committed the assaults on his two granddaughters under very similar circumstances and there would be an abundance of cross-admissibility of evidence.[21] We therefore conclude that the district court acted within its discretion in joining the two cases.

Admission of prior bad act

Appellant also claims that the district court erred in admitting evidence of his prior conviction and in refusing to allow him to stipulate to the prior conviction rather than allowing full testimony of the prior conviction. We disagree.

In McNelton v. State,[22] we held that before a court may admit evidence of a prior bad act, the court must find 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."[23] In addition, the decision of whether to admit evidence of prior bad acts is within the sound discretion of the trial court, and such decision should be respected when it is not "manifestly wrong."[24]

Appellant's conviction resulted from a guilty plea to lewdness with a minor for acts he committed against his eight-year old niece,

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[21]Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989) (If "evidence of one charge would be cross-admissible in evidence at a separate trial or on another charge, then both charges may be tried together and need not be severed").

[22]115 Nev. 396, 990 P.2d 1263 (1999).

[23]Id. at 405, 990 P.2d at 1269.

[24]Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985).

allegedly while she was a guest in his home. The state moved to admit this evidence and the district court held a hearing on the issue. The district court rejected the defense argument that the prior conviction and the present case were different because the conviction was based on a different act of sexual conduct - cunnilingus - versus actual penetration. The district court found that the acts were "extremely similar" and held that based on the guilty plea and conviction, the acts had been proven by clear and convincing evidence, and found that the probative value was not substantially outweighed by the danger of unfair prejudice. Specifically, the court found that the act showed a common scheme or plan and that the conduct was "similar to a behavioral fingerprint which is a legitimate means of showing identity." Based on the judgment of conviction, the district court determined that a Petrocelli hearing was not required. We agree with the district court's decision to admit the prior bad act.

Appellant also contends that the district court erred in refusing to allow him to stipulate to the prior conviction rather than admitting full testimony of the prior conviction relating to his niece. We disagree. Appellant relies on Old Chief v. U.S.[25] to support his argument. However, in Old Chief the defendant faced a charge of being a felon in possession of a firearm.[26] The defendant offered to stipulate to being a felon rather than face disclosure of the nature of the prior felony – which was for assault causing serious bodily injury.[27] Since the only issue was the defendant's legal status, the United States Supreme Court held that it

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[25]519 U.S. 172 (1997).

[26]Id.

[27]Id.

was error to refuse the defendant's offer.[28] Such is not the case here because more than appellant's legal status was at issue. Here, the prior conviction was used by the prosecution to show appellant employed a common scheme in the assaults.

Jury instructions

Appellant claims that the district court erred in refusing to submit his proffered jury instruction regarding young children's vulnerability to suggestion and in giving the jury two other instructions over his objections.

First, appellant claims the district court erred in refusing his proffered instruction that children are more vulnerable to suggestion and manipulation than adults. Appellant cites no authority supporting the use of his proposed instruction. We decline to consider arguments unsupported by relevant authority.[29] Appellant also contends that the district court erred in giving two jury instructions – one relating to the absence of the specific dates on which the conduct occurred and the other regarding the number of acts charged.[30] However, we conclude that the instructions were proper as they are consistent with our prior holdings.[31]

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[28]Id. at 192.

[29]NRAP 28(a)(4).

[30]Appellant objected to Instructions No. 10 and 17, which stated:

> [Instruction No. 10:]
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> Where a child has been the victim of sexual assault or lewdness with [a] minor, and does not remember the exact date of the act, the State is not required to plead or prove a specific date but

continued on next page . . .

Prosecutorial misconduct

Last, appellant claims that the State's argument during rebuttal closing argument constituted prosecutorial misconduct or violated principles of fundamental fairness. We disagree.

During rebuttal closing argument, the state made the following statement:

> Remember both [Victim 1 and Victim 2], their ages. . . . [Victim 2] was born on August 3rd of 1990 and [Victim 1] was born on September 27th, 1989. Well, happy birthday, [Victim 1], today, during the trial of a man, a grandfather, who took advantage of her.

Appellant argues that the statement was inflammatory and appealed to the passions and prejudices of the jury. The State contends that the statement was in no way directed at inflaming the jury. Instead,

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. . . *continued*

> may plead and prove a time frame within which the act took place.
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> [Instruction No. 17:]
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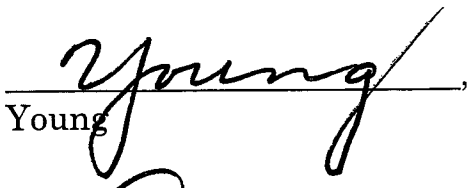
> It is not required that the victim of sexual assault or lewdness with a minor specify the exact number of incidents but there must be some reliable indicia that the number of acts charged actually occurred in order to sustain a conviction.

[31]See Bradley v. State, 109 Nev. 1090, 1096, 864 P.2d 1272, 1276 (1993) (holding that a victim must "testify with at least some particularity regarding the assault"); LaPierre, 108 Nev. at 531, 836 P.2d at 58 (holding that "the testimony of a sexual assault victim alone is sufficient to uphold a conviction" and that the victim need not "specify exact numbers of incidents, but there must be some reliable indicia that the number of acts charged actually occurred").

the state claims that the prosecutor was "rhetorically pointing out the ironic fact that one of the victim's birthday fell on [that] day."

We recently held that claims of prosecutorial misconduct that were not objected to during the district court proceedings will not be reviewed by this court unless they constitute "plain error."[32] The statement complained of does not rise to the level of "plain error" and we decline to consider the claim of error since defense counsel did not object to the statement at the time it was made and thus did not preserve the issue for appeal. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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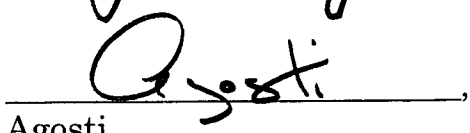

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Leavitt

cc: Hon. Joseph T. Bonaventure, District Judge
Michael V. Cristalli
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

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[32]Leonard v. State, 117 Nev. ___, ___, 17 P.3d 397, 403-04 (2001).