IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD STUART BAILEY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37424

FILED

APR 30 2001

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of lewdness with a child under 14 years of age. The district court sentenced appellant to a prison term of 24 to 96 months. The district court also ordered appellant to pay a $25.00 administrative assessment fee, a $250.00 DNA testing fee, and a $925.00 psychosexual evaluation fee.

Appellant first contends that his conviction was not supported by sufficient evidence. Particularly, appellant contends that the State failed to show that appellant acted with the intent of arousing, appealing to, or gratifying the lust or passions of either appellant or the victim. We disagree. There was sufficient testimony presented at appellant's trial to support the jury's verdict.[1] Specifically, the victim testified that, in approximately February 1997, when the victim was twelve years old and

[1]See Thomas v. State, 114 Nev. 1127, 1142, 967 P.2d 1111, 1121 (1998) (recognizing that the jury's verdict will not be overturned where sufficient evidence exists to support a finding of guilt beyond a reasonable doubt since it is the jury that weighs the evidence and determines the credibility of witnesses).

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incapacitated with a broken leg, appellant rubbed the victim's penis for a few seconds over his sweatpants. The victim was able to describe with specificity how appellant had rubbed him, and testified that he felt that what appellant did was wrong. Several months later, the victim told his mother about the incident; she testified that her son seemed kind of "quiet" and not "himself" afterward.

Additionally, two other male victims under fourteen years of age testified that appellant had grabbed them around the same time period. The first boy testified that, in the summer of 1997 when he was ten years old and working at appellant's candy store moving boxes, appellant "grabbed his nuts" for several seconds. The second boy testified that, in the fall of 1998, when he was eleven years old and driving with appellant, appellant reached over and touched his leg brushing his genital area.

In viewing this evidence in a light most favorable to the prosecution, we conclude that any rational trier of fact could find that appellant acted with the requisite intent to be guilty of lewdness with a child under 14 years of age.[2]

Appellant also contends that the district court erred in admitting testimony from the two other male victims, described above, because it was improper character evidence. Prior to admitting this testimony, the district court conducted a Petrocelli hearing on the record and outside the jury's presence, wherein it expressly found that this testimony was relevant evidence of appellant's intent to

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[2]See Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984).

commit an act of sexual aberration and that its probative value substantially outweighed its prejudicial effect. We conclude that the district court did not abuse its discretion in admitting this testimony as evidence of appellant's intent.[3]

Finally, appellant contends that the district court erred in denying his motion for a new trial based on juror misconduct. Appellant alleges that the jury, which was seated in the deliberation room, overheard loud comments about appellant made during the Petrocelli hearing, including that appellant was a pedophile and touched little boys' penises. After conducting an evidentiary hearing wherein eleven of the thirteen jurors[4] testified that they did not overhear anything said at the Petrocelli hearing, the district court denied appellant's motion, finding that there was no evidence of misconduct. We conclude that the district court did not abuse its discretion in finding that there was no juror misconduct in light of the fact that not one single juror testified that they overheard statements made at the Petrocelli hearing.[5]

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[3]See NRS 48.045(2); see also Keeney v. State, 109 Nev. 220, 228-29, 850 P.2d 311, 316-17 (1993) (holding that testimony of other instances of sexual misconduct with minors was admissible because it was relevant evidence of sexual aberration and its probative value outweighed its prejudicial effect), overruled on other grounds by Koerschner v. State, 116 Nev. ___, 13 P.3d 451 (2000).

[4]Although there were thirteen jurors, two jurors were not subpoenaed to testify due to the fact that they had moved out of the country.

[5]See, e.g., Tanksley v. State, 113 Nev. 997, 1003, 946 P.2d 148, 151 (1997) (district court's determination regarding juror misconduct is a question of fact for the court that will not reversed on appeal absent an abuse of discretion).

Having considered appellant's contentions and concluded that they lack merit, we hereby

ORDER the judgment of conviction AFFIRMED.

_____, J.
Shearing

_____, J.
Agosti

_____, J.
Rose

cc: Hon. John P. Davis, District Judge
Attorney General
Nye County District Attorney
Harold Kuehn
Nye County Clerk