IN THE SUPREME COURT OF THE STATE OF NEVADA

JACQUIN KEYSHAWN WEBB,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38027

FILED

MAY 14 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant Jacquin Keyshawn Webb appeals from a judgment of conviction of one count of first degree murder and one count of child abuse and neglect causing substantial bodily harm in the death of three-year-old Nichelle Miller. Webb raises five arguments on appeal.

First, Webb argues that the district court abused its discretion by admitting into evidence un-Mirandized statements he made to Metro Child Abuse and Neglect Specialist Sandy Durgin. We disagree.

Warnings against self-incrimination under Miranda v. Arizona[1] are only necessary when a suspect has experienced custodial interrogation. In determining whether custodial interrogation has occurred, we consider a totality of the circumstances, including the site of the interrogation, the focus of the investigation, objective indicia of arrest, and the form and length of questioning.[2] We have stated that an individual is not in custody where police officers only question him "on-scene regarding the facts and circumstances of a crime."[3]

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[1]384 U.S. 436, 444 (1966).

[2]See State v. Taylor, 114 Nev. 1071, 1081-82, 968 P.2d 315, 322-23 (1998).

[3]Id. at 1082, 968 P.2d at 323.

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Here, Webb was questioned by Specialist Durgin in a doctor's office/lounge. Although Webb may have been a suspect, Specialist Durgin was conducting a routine investigation into the facts surrounding Nichelle's injuries. Webb was neither handcuffed nor under arrest. There is no evidence that his freedom was inhibited. Rather, after Webb and Specialist Durgin returned to the hospital from a trip to his apartment, Webb freely left. Specialist Durgin was unarmed and wearing plain clothes. Additionally, Webb voluntarily agreed to speak. Given these considerations, we conclude that Webb was not subject to custodial interrogation and the district court properly admitted his un-Mirandized statements into evidence.

Second, Webb argues that the district court committed reversible error by admitting into evidence Nichelle's hearsay statements. We disagree.

NRS 51.315 provides an exception to the general hearsay rule when the declarant is unavailable and the nature and special circumstances under which the statement was made offer assurances of accuracy. Our underlying concern is whether the child was likely to be telling the truth.[4] We consider (1) spontaneity and consistency in the statement's repetition, (2) the child's mental state, (3) use of vocabulary consistent with the child's age, and (4) absence of a motive to lie.[5]

Here, the district court conducted a separate pre-trial hearing to determine whether Nichelle's hearsay statements contained the requisite guarantees of trustworthiness to be admitted under NRS 51.315.

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[4]Bockting v. State, 109 Nev. 103, 109, 847 P.2d 1364, 1368 (1993).

[5]See id.

Nichelle was deceased and, therefore, unavailable. Nichelle made the statement "Keeney beats me" to Rachel Elenback. On a separate occasion, Nichelle stated "Keeney hits me" to Victoria Bandel. Keeney was Webb's nickname. Both of Nichelle's statements were consistent, corroborated by physical evidence, made on separate occasions to two different people, and used vocabulary expected of a three-year-old child. There was no reason to believe that Nichelle would fabricate these statements. Therefore, we conclude that the district court properly admitted Nichelle's hearsay statements into evidence pursuant to NRS 51.315.

Third, Webb argues that the district court committed reversible error by admitting into evidence testimony of prior bad acts without conducting an evidentiary hearing pursuant to Petrocelli v. State.[6] We disagree.

The admissibility of evidence is within the sound discretion of the district court[7] and will not be disturbed on appeal unless the district court has abused its discretion[8] or made a ruling that was manifest error.[9] A district court should conduct a Petrocelli hearing prior to admitting evidence of a prior bad act pursuant to NRS 48.045(2).[10] The failure of the district court to conduct such a hearing warrants reversal unless the record is sufficient to determine the evidence was admissible under Tinch

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[6]101 Nev. 46, 692 P.2d 503 (1985).

[7]Petrocelli, 101 Nev. at 52, 692 P.2d at 507.

[8]Petty v. State, 116 Nev. 321, 325, 997 P.2d 800, 802 (2000).

[9]Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998).

[10]Armstrong v. State, 110 Nev. 1322, 1324, 885 P.2d 600, 601 (1994).

v. State[11] or the result would have been the same had the evidence not been admitted.[12] Under Tinch, the district court must determine that the incident is (1) relevant, (2) proven by clear and convincing evidence, and (3) not unfairly prejudicial.[13]

Here, Francis Miller, Nichelle's uncle, testified that Webb would "smack" Nichelle "on her butt." Miller also testified that he observed Webb hit Nichelle the day before she died. After hearing this testimony, the district court stated that

> I don't find it very prejudicial. But had I had a Petrocelli hearing on a single spank, I would have probably found it to be of slight relevance but sufficient to get in. And certainly it's clear and convincing evidence.

After reviewing the record, we conclude that it is sufficient for us to determine that the district court did not abuse its discretion in finding that Miller's testimony was relevant, proven by clear and convincing evidence, and not highly prejudicial to Webb. Given the overwhelming evidence of Webb's guilt, we also conclude that Miller's testimony would not have impacted the verdict in this case and the district court properly admitted his testimony into evidence even though it failed to conduct a Petrocelli hearing.

Fourth, Webb argues that the district court committed reversible error by refusing to give the jury an involuntary manslaughter instruction. We disagree.

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[11]113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

[12]McNelton v. State, 115 Nev. 396, 405, 990 P.2d 1263, 1269 (1999).

[13]See id.

We have held that a defendant is entitled to an instruction on a lesser included offense when his theory of defense is consistent with a conviction for that lesser included offense.[14] Although we remanded a first degree murder conviction by child abuse in Wegner v. State[15] due to the district court's failure to give an involuntary manslaughter instruction,[16] we find that the facts of this case are more akin to those in Graham v. State.[17] In Graham, we reasoned that

> [l]eaving a child alone on an ordinary bed . . . is not an "unlawful" act of either neglect or endangerment, nor is it a lawful act that "probably might" cause death in an unlawful manner, nor is it an act that would "naturally tend" to destroy life. . . . [T]he involuntary manslaughter instruction should not have been given.[18]

Here, Webb's theory of defense was that Nichelle must have awakened from a nap and injured herself while she was trying to get her toothbrush out of the medicine cabinet in the bathroom. If Webb's theory of defense were believed, as illustrated by our comments in Graham, Webb would not be guilty of involuntary manslaughter, let alone murder. Therefore, we conclude that an involuntary manslaughter instruction would have been inconsistent with Webb's theory of defense and was properly refused by the district court.

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[14]Walker v. State, 110 Nev. 571, 575, 876 P.2d 646, 649 (1994).

[15]116 Nev. 1149, 1157, 14 P.3d 25, 30-31 (2000).

[16]NRS 200.070.

[17]116 Nev. 23, 31, 992 P.2d 255, 259 (2000).

[18]Id.

Finally, Webb argues that the district court improperly denied his motion for a new trial based on newly-discovered notes containing allegations that two State witnesses who testified at trial used illegal drugs. We disagree.

The decision to deny a motion for a new trial based on newly-discovered evidence rests within the discretion of the district court.[19] Here, the notes were newly discovered, non-cumulative, and could not have been discovered even with the exercise of reasonable diligence. However, the notes do not indicate a different result is probable on re-trial and would only be used to discredit the two former State witnesses. Given these considerations,[20] we conclude that the district court did not abuse its discretion by denying Webb's motion for a new trial. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Young, J.
Young

Agosti, J.
Agosti

Leavitt, J.
Leavitt

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[19]Sandborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991); see NRS 176.515.

[20]See Hennie v. State, 114 Nev. 1285, 1290, 968 P.2d 761, 764 (1998).

cc: Hon. Jeffrey D. Sobel, District Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk