IN THE SUPREME COURT OF THE STATE OF NEVADA

GAREN M. PEARSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38098

FILED

JUN 15 2005

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

Garen Pearson appeals from a judgment of conviction, upon jury verdict, of fourteen counts of lewdness with a child under fourteen, seventeen counts of sexual assault of a minor under fourteen, four counts of sexual assault with a minor under sixteen, two counts of open or gross lewdness, and two counts of sexual assault.

Pearson was charged by way of information on July 1, 1999. On May 31, 2000, Pearson entered a plea of guilty to three counts of sexual assault with a minor under sixteen years of age, one count of lewdness with a minor under the age of fourteen, and one count of open or gross lewdness. Following that plea, Pearson unconditionally waived his right to a preliminary hearing. Subsequently, the district court granted Pearson's request to withdraw his guilty plea and to proceed to trial.

At the conclusion of the trial, the jury returned a guilty verdict and the district court sentenced Pearson to numerous life sentences, with parole eligibility beginning after 160 years because many of the counts were to run consecutively.

Pearson now appeals that verdict and claims that the district court erred: (1) in not allowing him to introduce jury instructions involving the consent of the alleged victims; (2) in allowing the State to introduce evidence of other bad acts; (3) in allowing Mark Groff, who is neither a victim nor the family member of a victim, to testify at Pearson's sentencing hearing; (4) in denying Pearson's motion requesting an independent examination of the alleged victims; and (5) in denying Pearson's motion to remand for a preliminary hearing. Pearson also alleges that he has been denied his right to an effective and timely appeal in violation of his due process rights.

1. Independent Psychological Examination

Prior to trial the district court denied Pearson's request for an independent psychological examination of the victims. Pearson argued that the real reason he wanted the examinations was that he had not received a preliminary hearing, and therefore there was no evidence concerning the maturity level of his victims. Pearson argued that in the event the district court denied his request for the examinations, he "would like the opportunity to go back to preliminary hearing." The district court denied Pearson's request for independent psychological examinations, noting that the jury was capable of making its own determination regarding the maturity level of the victims. Pearson now complains that the district court erred in denying his motion requesting an independent psychological examination of the victims. We disagree.

Under Keeney v. State, the rule applicable at the time of Pearson's trial, we weighed four factors to determine whether the decision of the district court constituted an abuse of discretion:

> (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; and (4) there is a reasonable basis for believing that the victim's mental or emotional state may have affected his or her veracity.[1]

Notably, here Pearson failed to demonstrate three of the Keeney factors.

First, Pearson readily admits that the State did not present expert testimony from a psychologist or psychiatrist. Second, Pearson not only failed to explain how the victims' mental states may have affected their veracity, he readily admitted that he did not question or doubt the victims' veracity. Third, because several children testified regarding incidents where other children were present, sufficiently corroborating one another's testimony, we conclude that an examination was simply unwarranted. We therefore reject Pearson's contention that the district court erred in refusing his motion to request an independent psychological examination of the child-victims.

2. Preliminary Hearing

Pearson also complains that the district court erred by refusing to remand his case to conduct a preliminary hearing. This argument is without merit. NRS 171.208 governs this issue and provides: "[I]f a preliminary examination has not been had and the defendant has not unconditionally waived the examination, the district court may for good cause shown at any time before a plea has been entered or an indictment found remand the defendant for preliminary examination."

In the instant case, Pearson unconditionally waived his right to a preliminary hearing, and that waiver was memorialized in the third

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[1]109 Nev. 220, 226, 850 P.2d 311, 315 (1993); see also Griego v. State, 111 Nev. 444, 893 P.2d 995, 999 (1995).

amended complaint. Therefore, under the language of the statute, Pearson was not entitled to a preliminary hearing.

3. Prior Bad Acts Evidence

a. Mark Groff and James Perkins

Additionally, the district court held a Petrocelli[2] hearing to determine the admissibility of the testimony of Mark Groff, James Perkins, and Karen Pearson. Groff and Perkins testified that Pearson had sexually abused them when they were minors.

At trial, Groff testified that in 1977, approximately twenty-five years prior to the trial, when Groff was twelve or thirteen, Pearson took him into the desert and sexually assaulted him. Perkins testified that Pearson began touching his genitals when he was six or seven years of age and that the two often played games together which involved inappropriate touching. In addition, Perkins testified that Pearson persuaded him and other boys from Perkins' little league team to get undressed and get into a hot tub together.

This court has determined that prior to the admission of evidence of prior bad acts, the district court must hold a hearing to determine whether: (1) the evidence is relevant to the crime charged; (2) the other act is proven by clear and convincing evidence; and (3) the probative value of the other act is not substantially outweighed by the danger of unfair prejudice.[3] In addition, the trial court's failure to conduct such a hearing is grounds for reversal unless "(1) the record is sufficient for this court to determine that the evidence is admissible under the test

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

[3]Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

for admissibility of bad acts evidence set forth in Tinch; or (2) where the result would have been the same if the trial court had not admitted the evidence."[4] The decision to admit or exclude evidence is within the discretion of the trial court and will not be overturned absent a showing that the decision is manifestly incorrect.[5] Failure to exclude such evidence is harmless error where overwhelming evidence supports the conviction.[6]

Here, the district court failed to specifically note on the record how the testimony in question was relevant and failed to properly address its probative value. However, we conclude that because multiple witnesses testified against Pearson and provided substantial evidence of his guilt in this particular case, any error made in allowing the admission of prior bad acts evidence was harmless.

b. Karen Pearson

Karen Pearson, Perkins' mother, testified at trial that she and Pearson only had sex one time during their relationship. The district court admitted Karen's testimony, finding that it did not fall under Petrocelli as a bad act and that it was relevant to the prosecution's theory that Pearson only became involved with women as a means of obtaining access to their sons. Pearson now challenges the admission of this evidence, arguing that it is inadmissible as evidence of a prior bad act. We reject this contention.

Pearson also argues that the testimony falls under the protection of the statute on spousal privilege pursuant to NRS

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[4]Qualls v. State, 114 Nev. 900, 903, 961 P.2d 765, 767 (1998).

[5]Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002).

[6]Richmond v. State, 118 Nev. 924, 934, 59 P.3d 1249, 1252 (2002).

49.295(1)(b), which states: "Neither a husband nor a wife can be examined, during the marriage or afterwards, without the consent of the other, as to any communication made by one to the other during marriage." Importantly, a defendant holds the privilege to prevent his/her spouse from testifying about any statements made "in reliance on marital confidence."[7] Here, we conclude that the testimony concerning the lack of sexual activity does not constitute "communication" between Pearson and Karen. Therefore, the testimony is not protected under the privilege because while the privilege may cover non-verbal types of communication such as letters, e-mails, gestures, and nods, it does not include the refusal to engage in sexual activity.

Furthermore, Pearson was required to invoke the privilege prior to Karen's testimony, and failed to do so, thus waiving the privilege.[8] Inasmuch as Pearson failed to assert his right, the issue is waived and we conclude that the district court did not commit manifest error in admitting such testimony.

4. Mark Groff's testimony at the sentencing hearing

Pearson also challenges the district court's decision to permit Mark Groff to testify at Pearson's sentencing hearing. The trial court's determination regarding the admissibility of evidence during a sentencing hearing will not be disturbed on appeal absent an abuse of discretion.[9]

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[7]Peck v. State, 116 Nev. 840, 847, 7 P.3d 470, 474 (2000) (citing Franco v. State, 109 Nev. 1229, 1243-44, 866 P.2d 247, 256 (1993)).

[8]Id.

[9]Wesley v. State, 112 Nev. 503, 519, 916 P.2d 793, 804 (1996).

Additionally, a sentence will not be overturned where such an error was harmless.[10]

NRS 176.015(3) allows for victims to speak at a sentencing hearing of the individual that has been convicted and provides in pertinent part: "the court shall afford the victim an opportunity to: (a) Appear personally, by counsel or by personal representative; and (b) Reasonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution." NRS 176.015(5)(b) defines the term victim to include: "(1) A person, including a governmental entity, against whom a crime has been committed; (2) A person who has been injured or killed as a direct result of the commission of a crime; and (3) A relative of a person described in subparagraph (1) or (2)." NRS 176.015(6), however, broadens the scope of NRS 176.015 because it states: "[t]his section does not restrict the authority of the court to consider any reliable and relevant evidence at the time of sentencing."

Importantly, in Sherman v. State,[11] this court addressed the admissibility of testimony from a previous murder victim's family. We noted that evidence of the impact that the presently charged murder had on the victim's family demonstrates the harm done by that crime.[12] Additionally, evidence of previous murders is also relevant to show an aggravating circumstance.[13] However, "evidence of the impact which a

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[10]Sherman v. State, 114 Nev. 998, 1014, 965 P.2d 903, 914 (1998).

[11]Id.

[12]Id.

[13]Id.

previous murder had upon the previous victim is not relevant to show either of these facts."[14]

This court concludes that the instant case is analogous. The impact that Pearson's alleged previous misconduct had on Mark was irrelevant to the sentencing proceedings in this case. Here, however, the testimony of each of the victims was sufficient to justify the imposition of Pearson's sentence, and, as a result, it follows that Pearson failed to demonstrate that the result would have been different in the absence of Mark's statement. Therefore, we conclude that the admission of such evidence at the sentencing hearing constituted harmless error.

5. Proposed Jury Instructions

Pearson also challenges the district court's denial of his request for jury instructions dealing with the consent of the victims. In the matter at bar, both of the parties agree that it is unclear whether statutory sexual seduction is a lesser-included offense of sexual assault. In previous case law, this court concluded that statutory sexual seduction was not a lesser-included offense.[15]

However, these decisions were written prior to the Legislature's decision to remove proof of consent as an element of statutory sexual seduction.[16] Since the amendment of the statute, this court dealt with this issue, albeit in dicta, in Robinson v. State, which concerned the question of whether a minor charged with the crime of statutory sexual assault was entitled to an instruction on the lesser-

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[14]Id.

[15]Slobodian v. State, 107 Nev. 145, 148, 808 P. 2d 2, 4 (1991).

[16]NRS 200.364 (amended by 1991 Nev. Stat., ch. 305, § 1, at 801).

included offense of statutory sexual seduction.[17] In that case, this court concluded that statutory sexual seduction is a lesser-included offense of sexual assault, and therefore, the minor was entitled to the instruction.[18] Therefore, this court has already concluded that statutory sexual seduction is a lesser-included offense of sexual assault.

Moreover, we note that such a conclusion comports with an analysis of the statutes under the elements test adopted by this court in Lisby v. State.[19] This test requires that the elements of the lesser-included offense be included in the elements of the greater offense.[20] Therefore, under Nevada law, a crime is a lesser-included offense only if the greater offense cannot be committed without committing the lesser-included offense.

> NRS 200.364(3) defines statutory sexual seduction:
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> (a) Ordinary sexual intercourse, anal intercourse, cunnilingus or fellatio committed by a person 18 years of age or older with a person under the age of 16 years; or
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> (b) Any other sexual penetration committed by a person 18 years of age or older with a person under the age of 16 years with the intent of

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[17]Robinson v. State, 110 Nev. 1137, 1139 881 P.2d 667, 668 (1994).

[18]Id. (The court stated that, "[I]n summary, Robinson is entitled to the same instructions as other adults accused of the crime of sexual assault, because he was tried as an adult. The trial court erred when it refused to give the instruction on the lesser included-offense of statutory sexual seduction.").

[19]82 Nev. 183, 187, 414 P.2d 592, 594 (1966).

[20]Id.

> arousing, appealing to, or gratifying the lust or passions or sexual desires of either of the persons.

NRS 200.366 defines sexual assault and states:

> 1. A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or another, or on a beast, against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault.

Respondent argues that consent is an element of statutory sexual seduction. However, no language in the statute requires proof of consent. Instead, a person is guilty of statutory sexual seduction if they engage in any of the four acts expressed in subsection (a) or any other sexual penetration under subsection (b) and they are 18 years or older and the victim is younger than 16. Sexual assault with a minor subsumes these elements and requires the additional element of lack of consent to be proven. Therefore, we conclude that statutory sexual seduction is a lesser-included of sexual assault.

Under Nevada law, a defendant is entitled to a jury instruction on a lesser-included offense when the following requirements are satisfied: (1) the offense for which the instruction is sought is a lesser included offense of the charged offense, (2) the defendant's theory of defense is consistent with a conviction for the lesser-included offense, and (3) evidence of the lesser-included offense exists.[21] Importantly, in

[21]Walker v. State, 110 Nev. 571, 574, 876 P.2d 646, 648 (1994).

determining whether the failure to give such an instruction is harmless error, this court has stated that " '[a] defendant in a criminal case is entitled, upon request, to a jury instruction on his theory of the case so long as there is some evidence, no matter how weak or incredible, to support it."[22] In fact, this court has noted that "where 'there is evidence which would absolve the defendant from guilt of the greater offense or degree but would support a finding of guilt of the lesser offense or degree,' an instruction on the lesser-included offense is mandatory even if not requested."[23]

A review of the record in this case shows that the defendant did submit some evidence, albeit weak, that the victims consented to the sexual activities.

J.M. was eleven years old at the time of the trial, and testified that on several occasions he by himself, or along with other boys, would either touch, and or suck, on Pearson's penis. Most of this touching took place within the context of a game played with quarters. Apparently, one group of boys would roll quarters and, depending on whether the quarter landed on heads or tails, other boys would have to perform various acts with Pearson and with each other.

On cross-examination, J.M. gave the following testimony:

> Q: And at any of these times Garen never forced you to play the game, did he?
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> A: He didn't force but he told us, "Let's play," or something. And I wouldn't say no because --

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[22]Peck v. State, 116 Nev. 840, 844, 7 P.3d 470, 472 (2000).

[23]Id. at 844, 7 P.3d at 473.

Q: You never said no, but you voluntarily played the game?

A: Yeah.

Q: And so did Louis and Adrian?

A: Yes.

Q: Is that a yes?

A.M. who was twelve years old at the time of the trial, testified that Pearson was his little league coach. A.M. testified that he had played the same game involving quarters that J.M. testified to having played. On cross-examination, A.M. gave the following testimony:

Q: You testified in response to some question that Garen never threatened you; is that right?

A: Yes.

Q: And you also said though that you were still scared though; is that right?

A: Yes.

Q: But did you ever -- you never told Garen that you were scared, right?

A: No, I never told him that.

Q: And you never said, "No, I don't want to do this anymore," to Garen?

A: Like just tell him -- like no?

Q: Yeah.

A: Well, because that also kind of goes to scared. If I had been like, "No, I don't want to do this no more," he would probably call me names and everything and make me kneel down like he made S.S.

L.G. also testified at trial. At the time of the trial L.G. was 16 years old. He offered the following testimony:

Q: And I believe you said Adrian started this game?

A: Yeah.

Q: And what game was that?

A: The quarter game.

Q: And why do you tell us now you believe Adrian started the game?

A: Because these things never happened when me and Garen was around.

. . .

Q: Is it true, ... , at this game and the subsequent later game that happened, isn't it true that Garen told you you didn't have to play?

A: Yeah.

Q: He did tell you that, didn't he?

A: Yeah.

Q: You never told him you didn't want to play?

A: Yeah.

Q: But he said, "You don't have to play if you don't want to."

A: Yeah.

Q: He never forced you to play?

A: No.

G.S. testified that at the time of the trial he was twenty years old. At trial Sned was asked whose idea it was when G.S. performed oral sex on Pearson and he offered the following testimony:

A: We both kind of just consented it, I guess.

Q: Did you want to do that?

A: No.

Q: Why did you?

A: I guess – he didn't, like, make me. He didn't say physically, "Wayne, you got to do this." I just felt that it was the right thing to do.

This testimony constitutes some evidence of consent on the part of four of Pearson's victims. Consequently, we conclude that the district court committed reversible error in failing to give Pearson's requested instruction. As noted in Peck, the district court was required to give this instruction as soon as Pearson presented evidence that the victims consented.[24] Therefore, we conclude that Pearson's' convictions for sexual assault with a minor concerning these four victims must be overturned and the case remanded for a new trial on those particular charges.

Pearson contends that he was entitled to a consent instruction on both the charges of lewdness with a minor as well as the charges of sexual assault. We disagree because we have previously established that because lewdness with a minor is a strict liability offense, consent is never a defense.[25] Therefore, a consent instruction pertaining to lewdness with a minor is not appropriate because such an instruction would constitute a misstatement of the law.

We affirm Pearson's remaining convictions for sexual assault as they pertain to the other three victims. Additionally, we affirm Pearson's convictions for Lewdness with a minor.

6. Right to a timely appeal

Pearson filed his notice of appeal on June 22, 2001. Unfortunately, the court reporter responsible for filing requested

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[24]Peck, 116 Nev. at 844, 7 P.3d at 473.

[25]State v. Koseck, 113 Nev. 477, 479, 936 P.2d 836, 838 (1997).

transcripts left the state of Nevada and failed to file the transcripts with the court. As a result, Pearson sought and received extensions of time in the briefing schedule. On October 10, 2003, Pearson filed a motion for release or in the alternative for remand for a new trial. This court denied the motion and instructed Pearson to raise the issues in his opening brief on appeal.

In multiple orders, this court directed that the court reporter, Dina Dalton, file the missing transcripts. All of the transcripts from the trial have been filed with the exception of the State's opening closing argument, which occurred on March 27, 2001.[26] In total, Pearson's appeal was delayed for three years. On February 8, 2005, we issued an order remanding this appeal "to the district court for the limited purpose of assembling and settling upon an adequate reconstruction of the state's opening closing argument conducted on March 17, 2001. See NRAP 9(d)."[27]

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[26]Pearson v. State, Docket No. 38098 (Order Remanding For Reconstruction of Portion of Closing Argument, February 8, 2005) (We noted that "[p]ursuant to NRS 171.145(5), unless a case is submitted to the jury without argument, the state's attorney must open and conclude the argument when the evidence in a trial is concluded. Our reference to the 'opening closing argument' refers to the state's first 'opening' of the argument after the evidence was concluded.").

[27]NRAP 9(d) (For example, the district court may direct a court reporter or recorder to promptly prepare the missing portion of the transcript if it is capable of being reproduced from any available audiotapes or logs. If no other means are available to reconstruct the missing part of the transcript, the district court shall direct the parties to prepare, to the extent possible, a statement of the proceedings pursuant to NRAP 9(d) and shall settle and approve that statement).

This court has recognized that "[o]bviously, meaningful, effective appellate review depends upon the availability of an accurate record covering lower court proceedings relevant to the issues on appeal. Failure to provide an adequate record on appeal handicaps appellate review and triggers possible due process clause violations."[28] Importantly, however, we have also observed that reconstruction is the proper procedure to be followed unless an appellant is able to demonstrate, specifically, that error or prejudice occurred.[29]

On March 14, 2005, the district court filed its findings of fact regarding reconstruction of the record. The district court stated:

> The State has submitted a memorandum and affidavit of Chief Deputy District Attorney Thomas M. Carroll which sets-forth [sic] his recollection of the State's opening closing argument and contains a chart which was used for demonstrative purposes during said argument. The Court finds that the affidavit of Chief Deputy Carroll accurately summarizes his opening closing argument. . . .

In addition, the district court noted that:

> Deputy Public Defender Christensen has submitted an affidavit indicating that he has no specific recollection of the precise content of the

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[28]Lopez v. State, 105 Nev. 68, 84-85, 769 P.2d 1276, 1287 (1989) (citing Van White v. State, 752 P.2d 814, 820-821 (Okl. Cr. 1988); State v. Dupris, 373 N.W.2d 446, 448-449 (S.D. 1985); State v. Bolling, 246 S.E.2d 631, 637 (W.Va. 1978)).

[29]Id. at 85, 769 P.2d at 1287-88 (citing Butler v. State, 570 S.W.2d 272, 274-275 (Ark. 1978); Craig v. State, 510 So. 2d 857, 861 (Fla. 1987); Montford v. State, 298 S.E.2d 319, 321 (Ga. 1982); State v. Wright, 542 P.2d 63, 64-65 (Idaho 1975); State v. Dupris, 373 N.W.2d 446, 449 (S.D. 1985); State v. Helmick, 286 S.E.2d 245, 249 (W.Va. 1982)).

> State's opening closing argument or whether the defense objected at any time during the said argument. Deputy Public Defender Christensen further indicates that he has reviewed his trial notes and has not found any notes discussing the content of the State's opening closing argument or any objections made by the defense during said argument.

As a result of these findings, we conclude that the reconstruction of the State's opening closing argument provides a sufficient basis for review by this court, and we conclude further that the record does not demonstrate that any error or prejudice occurred. This, however, is not the end of our inquiry. We must next determine whether the delay in reconstructing the record resulted in a violation of Pearson's due process rights.

Previously, we determined that a defendant may be denied his due process rights when an excessive delay in the appellate process occurs.[30] However, to prevail on such a claim an appellant must "demonstrate that he is unable to present an adequate appeal because of the delay, or that he will be unable to adequately defend in the event the conviction is reversed and retrial is ordered."[31]

In the instant case, we conclude that Pearson failed to demonstrate that he is unable to present an adequate appeal because of the three-year delay in perfecting this appeal.[32] Instead, the

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[30]Id. at 68, 769 P.2d at 1288.

[31]Id. at 87-88, 769 P.2d at 1289.

[32]See id. (We declined to conclude that a three-year delay in appellate review resulted in prejudice because the appellant did not demonstrate that he was unable to present an adequate appeal).

reconstruction of the record indicates that no error occurred during the State's opening closing argument. Indeed, even Deputy Public Defender Christensen, while maintaining that the missing records compel the conclusion that a valid appeal cannot be presented, admitted that he "had the opportunity to review the State's Affidavit of a reconstructed record and will acknowledge that the State's Affidavit appears to accurately document which portions of the transcripts are missing."[33] Notably, neither party recalls any objections being made during the State's opening closing argument.[34]

Moreover, we note that any arguments made during the State's opening closing argument did not constitute evidence and did not establish the facts of this case.[35] In fact, the court provided instruction No. 7 to the jury, which stated "Statements, arguments and opinions of counsel are not evidence in the case." In addition, we have previously observed that "[d]uring closing argument counsel enjoys wide latitude in arguing facts and drawing inferences from the evidence."[36] As a result,

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[33]Pearson, Docket No. 38098 (Findings of Fact Regarding Reconstruction of Portion of Closing Argument, March 14, 2005).

[34]Id.

[35]Jain v. McFarland, 109 Nev. 465, 475-476, 851 P.2d 450, 457 (1993) (citing Phillips v. Allstate Ins. Co., 603 P.2d 1105, 1108 (N.M. Ct.App. 1979)); see Lord v. State, 107 Nev. 28, 33, 806 P.2d 548, 551 (1991); Klein v. State, 105 Nev. 880, 884, 784 P.2d 970, 972-73 (1989)).

[36]Jain, 109 Nev. at 476, 851 P.2d at 458 (citing State v. Teeter, 65 Nev. 584, 641, 200 P.2d 657, 685 (1948)).

counsel is allowed to argue any reasonable inferences, which can be drawn from the evidence at trial.[37]

Here, the notes attached by the State in its affidavit depicting the evidence to be discussed as part of its opening closing argument do not mention any evidence unsupported by the trial record. This, combined with the fact that neither the parties nor the court can remember any objections being made during the argument, is enough to permit this court to reasonably infer that no prejudice occurred. Consequently, we conclude that Pearson was not prejudiced by the delay in obtaining a complete appellate record and that his argument concerning the violation of his due process rights is not persuasive.

Accordingly, we ORDER the judgment of conviction AFFIRMED in part and REVERSED in part and REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Rose

_____, J.
Gibbons

_____, J.
Hardesty

[37]Id. (citing Teeter, 65 Nev. at 642, 200 P.2d at 685).

cc: Hon. Michael A. Cherry, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk