IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES FISHER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38166

FILED

APR 0 9 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of four counts of sexual assault of a minor under sixteen years of age (Counts I-IV), and one count of lewdness with a child under fourteen years of age (Count V). The district court sentenced appellant to the following terms in the Nevada State Prison: three concurrent terms of life with the possibility of parole after twenty years for Counts I-III; a term of life with the possibility of parole after five years for Count IV, to be served consecutively to Count III; and a term of twenty-four to sixty-two months for Count V.

Appellant first contends that the district court erred in allowing the State to repeatedly ask the victim leading questions in violation of NRS 50.115(3). Initially, we note that defense counsel failed to contemporaneously object at trial to most of the questioning that appellant now challenges. This court has held that "[a]s a general rule, failure to object below bars appellate review."[1] Additionally, this court has stated that "[w]hether leading questions should be allowed is a matter mostly within the discretion of the trial court, and any abuse of the rules

[1]Emmons v. State, 107 Nev. 53, 60-61, 807 P. 2d 718, 723 (1991).

regarding them is not ordinarily a ground for reversal."[2] We conclude that the district court did not abuse its discretion in allowing the prosecutor to ask leading questions of the victim. Evidence produced at trial indicated that the mentally disabled victim had a "mental age" of less than ten years. Thus, the district court's decision to allow the prosecutor to ask some leading questions of the victim was understandable. Moreover, the prosecutor generally refrained from suggesting specific answers in her questions. Finally, in light of the other substantial evidence of appellant's guilt produced at trial, we conclude that appellant suffered no prejudice in this regard.

Second, appellant contends that the district court erred in allowing examining nurse Phyllis Suiter and neighbor Donna Cummins to testify about prior out-of-court statements the victim made to them regarding the sexual assaults. Specifically, appellant contends that the victim's statements constituted hearsay, and were therefore inadmissible.[3] Again, we note that defense counsel failed to contemporaneously object to Suiter's testimony at trial, and thus failed to preserve this claim for appeal.[4] With regard to Cummins' testimony, we conclude that the district court did not abuse its discretion in permitting it.[5] As the State contends, the statements were admissible under the general, excited

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[2]Barcus v. State, 92 Nev. 289, 291, 550 P.2d 411, 412 (1976) (quoting Anderson v. Berrum, 36 Nev. 463, 470, 136 P. 973, 976 (1913)).

[3]See NRS 51.065.

[4]See Emmons, 107 Nev. at 61, 807 P.2d at 723.

[5]See Dearing v. State, 100 Nev. 590, 592, 691 P.2d 419, 420 (1984) (stating that where testimony is properly received, "[i]t is of no import that the district court gave a different reason for admitting the testimony[.]") citing Cunningham v. State, 100 Nev. 396 n. 1, 683 P.2d 500 (1984).

utterance, and then existing mental, emotional or physical condition exceptions to the hearsay rule.[6]

Third, appellant contends that the evidence presented at trial was insufficient to support the jury's findings of guilt. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[7]

In particular, we note that the victim's testimony indicated that appellant had engaged in two acts of vaginal intercourse, one act of anal intercourse, and three acts of fellatio with the victim at various times between early 1996 and late 1998. Although appellant testified that the crimes never occurred, there was substantial evidence produced at trial to corroborate the victim's testimony. The victim's mother testified that between 1996 and 1997, she had encountered appellant standing naked in front of the victim at approximately two o'clock in the morning, and on another occasion found appellant lying in bed with the victim with his hand on the victim's chest. Neighbor Donna Cummins also testified that in 1998 she discovered appellant masturbating in front of the victim while the victim bathed, and that in early December 1998 the victim had approached Cummins in tears and stated that appellant "hurts me" and had forced the victim to engage in vaginal intercourse, anal intercourse, and fellatio with him. Moreover, Child Protective Services investigator Keichia English and examining nurse Phyllis Suiter both testified that the victim had told them that appellant had sexually assaulted her. Suiter also testified that she discovered injuries consistent with sexual assault

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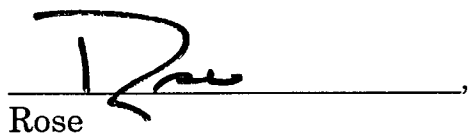
[6]See NRS 51.075; NRS 51.095; NRS 51.105.

[7]See Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 314 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

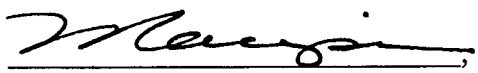
during her physical examination of the victim. Further, the arresting officer testified that appellant had been hiding in a bathtub when he was ultimately apprehended, which arguably tended to show appellant's consciousness of guilt. The jury could reasonably infer from the evidence presented that appellant was guilty of the crimes charged. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.[8]

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant's contentions are without merit. Accordingly, we

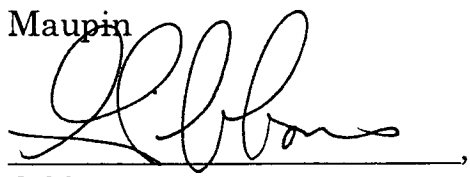
ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose



_____, J.
Maupin



_____, J.
Gibbons

cc: Hon. Donald M. Mosley, District Judge
Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender
Clark County Clerk

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[8]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).