IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTWON DONELL PERKINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87313

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree kidnapping of a minor, battery with intent to commit sexual assault of a victim under 16, lewdness with a child under the age of 14, and three counts of sexual assault of a minor under 14 years of age. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Appellant Antwon Perkins was charged with 11 category A felonies. Counts 1-5 (hereinafter the T.S. counts) stem from the abduction and sexual assault of 11-year-old T.S. on May 23, 2018. Counts 6-11 (hereinafter the L.L. counts) stem from the abduction and sexual assault of 12-year-old L.L. on January 24, 2019. Following trial, a jury convicted Perkins of the L.L. counts but not the T.S. counts. He was sentenced to serve an aggregate prison term of 110 years to life. Perkins now appeals, arguing that the district court abused its discretion by (1) denying his motion to sever the T.S. counts from the L.L. counts and hold two separate trials, (2) denying his motion to suppress evidence that he attempted suicide after learning he was a suspect, and (3) allowing the State to present testimonial hearsay through an expert witness. Perkins also claims that the cumulative effect of errors below violated his due process right to a fair trial and requires the reversal of his conviction.

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Joinder

Perkins argues that the district court abused its discretion by denying his motion to sever the T.S. counts from the L.L. counts and hold two separate trials. "Decisions to join or sever are left to the discretion of the trial court and will not be reversed absent an abuse of discretion." *Tabish v. State*, 119 Nev. 293, 302, 72 P.3d 584, 589-90 (2003). Joinder of two offenses in a single trial is proper if they are "[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan." NRS 173.115(1)(b); *see* NRS 174.155. But even if these conditions are met, a court may still sever charges if joinder would cause unfair prejudice to the defendant. NRS 174.165(1). "To *require* severance, the defendant must demonstrate that a joint trial would be manifestly prejudicial. The simultaneous trial of the offenses must render the trial fundamentally unfair, and hence, result in a violation of due process." *Rimer v. State*, 131 Nev. 307, 323-24, 351 P.3d 697, 709 (2015) (internal quotation marks omitted).

As it relates to prejudicial joinder, courts have expressed particular concern with the State's stronger evidence relating to certain counts unfairly bolstering a weaker case on the other counts—i.e., the "spillover effect." *See Tabish*, 119 Nev. at 305, 72 P.3d at 592 (internal quotation marks omitted) (finding a due process violation where a weaker case related to one victim was bolstered by combining it with a stronger case related to a second victim); *Bean v. Calderon*, 163 F.3d 1073, 1083 (9th Cir. 1998) (reversing conviction because joinder created impermissible risk that the jury convicted on the prosecution's weak case for one murder by relying on the stronger evidence of another murder); *but see Rimer*, 131 Nev. at 324, 351 P.3d at 710 (affirming conviction where all joined charges were strong

and none of the charges were so weak as to suggest an impermissible spillover effect).

Here, the State's evidence against Perkins on the L.L. counts was clearly much stronger than its evidence against Perkins on the T.S. counts. This created a substantial risk that the jury would convict Perkins on the T.S. counts based on an impermissible inference of criminal propensity stemming from the stronger evidence on the L.L. counts. However, "[a]n error arising from misjoinder is subject to harmless error analysis and warrants reversal only if the error had a substantial and injurious effect or influence in determining the jury's verdict." *Tabish*, 119 Nev. at 302, 72 P.3d at 590 (internal quotation marks omitted). To find an error harmless, the "[e]vidence against the defendant must be substantial enough to convict him in an otherwise fair trial, and it must be said without reservation that the verdict would have been the same in the absence of error." *Homick v. State*, 112 Nev. 304, 316, 913 P.2d 1280, 1288 (1996), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004). Though Perkins may have been deprived of a fundamentally fair trial on the T.S. counts, he was not convicted of any of those counts. Based on the overwhelming evidence of guilt on the L.L. counts, we have no reservations in concluding that any error in joining the charges was harmless beyond a reasonable doubt.

Motion to suppress evidence of suicide attempt

The day after the abduction and assault of L.L., Perkins sent text messages to a friend expressing suicidal ideations. When police later showed up to the house where Perkins was located, he barricaded himself in the home and attempted suicide. Perkins argues that the district court abused its discretion by denying his motion to suppress the evidence related to his suicide attempt. In denying his motion, the district court found that

the suicide attempt showed consciousness of guilt. "Trial courts have considerable discretion in determining the relevance and admissibility of evidence." *Atkins v. State*, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996), *overruled on other grounds by McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004). "An appellate court should not disturb the trial court's ruling absent a clear abuse of that discretion." *Id.*

This court has previously held that "[t]he fact that an accused attempts to commit suicide, or evidence sufficient to justify such an inference, is *always proper* for the jury to consider in connection with the other evidence in the case." *State v. Plunkett*, 62 Nev. 258, 279, 149 P.2d 101, 107 (1944) (emphasis added). But Perkins asserts that the evidence was irrelevant and prejudicial and, therefore, inadmissible because he authored text messages prior to the suicide attempt disavowing the allegations and providing alternate justifications for the suicide attempt. To support his contentions, Perkins relies on dicta from *Plunkett* and an unpublished disposition from this court.

Though the text messages authored by Perkins prior to his suicide attempt suggested that the police were trying to set him up and alluded to alternate justifications for the suicide attempt, nothing in the texts could be read as an explicit denial of these crimes, and the timing of his actual suicide attempt was enough for a jury to infer a guilty conscience for committing the crimes notwithstanding the content of the messages. We conclude the district court did not clearly abuse its discretion by allowing the jury to hear the evidence of Perkins' suicide attempt and texts regarding his suicidal ideations.

Testimonial hearsay

Perkins argues the district court abused its discretion by allowing an expert witness, Rachell Ekroos, to present testimonial hearsay

contained in a Sexual Assault Nurse Examiner (SANE) report authored by the doctor who conducted L.L.'s sexual assault examination, Dr. Alexis Pierce. In *Vega v. State*, this court determined that a SANE report constitutes testimonial hearsay, and that using a surrogate to testify about the findings contained in the report effectively admitted the report into evidence without subjecting the author of the report to cross-examination. 126 Nev. 332, 340, 236 P.3d 632, 638 (2010). The court determined that the portions of the surrogate witness's testimony in which she "recounted [the examiner]'s questions, the victim's answers depicting the victim's medical history and history of sexual abuse, and [the examiner]'s observations and findings," violated the Confrontation Clause but did not amount to plain error. *Id.* at 341, 236 P.3d at 638.

Here, Ekroos did not recount the original examiner's questions, L.L.'s answers, or the examiner's observations and findings. Her testimony was based on her own independent opinion from her observations of photographs taken at the original examination as well as her observations from conducting L.L.'s follow-up examination. Thus, we conclude that she did not present testimonial hearsay, and the district court did not abuse its discretion in admitting the testimony.[1]

Perkins also argues that because Ekroos was not present during the collection of DNA evidence from L.L., he unfairly lost the ability to cross-examine a witness regarding chain-of-custody. Perkins objected on this basis below, and the district court overruled the objection. But any

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[1]Perkins also argues on appeal that the district court erred by admitting the evidence under the business record exception to the rule against admitting hearsay. *See* NRS 51.135. Because we conclude that Ekroos did not present testimonial hearsay, we need not address this argument.

gaps or doubts as to the chain of custody "go to the weight, not the admissibility, of th[e] evidence." *See, e.g., Cortes v. State*, 127 Nev. 505, 517, 260 P.3d 184, 193 (2011); *Hughes v. State*, 116 Nev. 975, 981, 12 P.3d 948, 952 (2000). The jury was free to consider the lack of chain-of-custody testimony and weigh the DNA evidence accordingly.

Cumulative error

Perkins argues that if each assigned error is harmless individually, the cumulative effect of the errors requires reversal. *See Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002) (stating "[t]he cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually"). Here, "there are not multiple errors to cumulate" and therefore Perkins' contention is without merit. *See Burnside v State*, 131 Nev. 371, 407, 352 P.3d 627, 651 (2015). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Stiglich, J.

Pickering, J.

Parraguirre, J.

cc: Hon. Eric Johnson, District Judge
Gaffney Law
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk