IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN JAMES O'GORMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87962

FILED

APR 04 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY:
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of sex trafficking of a minor and use of a minor as the subject of a sexual performance. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

Factual Background

O'Gorman's convictions arose from a series of sexual interactions and communications between himself and minor child, S.B. S.B. received O'Gorman's phone number from a friend who told her that O'Gorman was a potential "sugar daddy."[1]. S.B. contacted O'Gorman, told him she was 17, and the two met up to discuss the type of arrangement he was interested in. O'Gorman explained that he was looking for an ongoing arrangement that was both sexual and emotional in nature, and that he would pay S.B. $1,000 every time they had sex. He also told S.B. that the

[1]Sugar dating or "sugaring" generally refers to an ongoing sexual, emotional, and financial arrangement between an older (usually) man, the "sugar daddy," and younger (usually) woman, the "sugar baby," wherein the sugar daddy provides money, gifts, and experiences for the sugar baby who repays him in sex and companionship.

arrangement would be a secret because he was married, and that he didn't want S.B. to have sex with anyone besides him.

Over the following months, S.B. and O'Gorman had sex more than once a month at hotels or O'Gorman's home at his request. O'Gorman would transport S.B. to these meetings in his car and afterwards he would pay her in cash. O'Gorman also bought S.B. various gifts and gave her additional money for personal expenses. O'Gorman offered to buy S.B. a car when she turned 18, and he allowed her to use his credit card to buy clothes. O'Gorman would ask S.B. to send nude photographs and videos of herself. She took explicit photos and videos of herself and sent them to O'Gorman but testified at trial that she would not have sent these photos and videos if O'Gorman hadn't asked her to. S.B. testified that she felt she had to send O'Gorman photographs or it would "ruin [their] relationship," but that O'Gorman's lascivious comments about the photographs made her uncomfortable. She also testified that when she hadn't seen O'Gorman for a few days that he "kept reminding [her]" to send more nude photographs and videos.

Eventually, S.B. wished to end the arrangement with O'Gorman so she told her mother, who called law enforcement. O'Gorman was subsequently arrested and charged with sex trafficking of a minor, use of a minor to be the subject of a sexual portrayal in a performance, and abuse or neglect of a child. The case proceeded to trial where a jury convicted O'Gorman of sex trafficking of a minor and use of a minor as the subject of a sexual portrayal in a performance but acquitted him of the charge of abuse or neglect of a minor.

The evidence is sufficient to sustain the conviction of sex trafficking

O'Gorman asserts that the evidence presented at trial was insufficient to support the conviction of sex trafficking pursuant to NRS 201.300(2). We review a challenge to the sufficiency of evidence by deciding if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see also Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44 (1984).

In support of his argument, O'Gorman cites to *Stanifer v. State*, 109 Nev. 304, 308-09, 849 P.2d 282, 285-86 (1993), in which this court distinguished between the crimes of solicitation (NRS 201.354) and pandering (NRS 201.300(1)) and concluded that pandering occurs when an individual recruits someone to work as a prostitute or sets them up in the business of prostitution. O'Gorman asserts that he did not intend to set S.B. up in business as a prostitute or have her serve other customers, but merely intended to turn her into his exclusive, "underage well-kept mistress." At most, he argues, the evidence shows that he is guilty of being her customer, thereby committing the crime of solicitation, not the crime of pandering.

However, O'Gorman was neither charged with, nor convicted of pandering, rather he was convicted of sex trafficking, an entirely different crime. He makes no argument concerning the elements of sex trafficking or how there was insufficient evidence to prove those elements. And looking to the plain language of the sex trafficking statute, NRS 201.300(2)(a)(1), O'Gorman's actions are consistent with one who "[i]nduces, causes, recruits,

harbors, transports, provides, obtains or maintains a child to engage in prostitution.". He "transported" S.B. in his car, he "maintained" an arrangement with her to pay her for sex, and he "induced" her to engage in prostitution by promising and providing money and other things of value in exchange for sex.

Moreover, under Nevada law, O'Gorman can be both S.B.'s customer *and* her trafficker, as the two are not mutually exclusive. The entirety of NRS 201.300, which criminalizes both pandering and sex trafficking, underwent major amendments in 2013. 2013 Nev. Stat., ch. 426, § 42, at 2430. The Legislature amended the pandering statute to specifically preclude the customer of a prostitute from being a panderer. NRS 201.300(1) (defining pandering and stating "[t]his subsection does not apply to the customer of a prostitute"). However, no such provision was made for the crime of sex trafficking. Given the absence in NRS 201.300(2)(a)(1) of any language excluding a person from culpability due to his status as a customer, O'Gorman could be guilty of sex trafficking despite being S.B.'s customer.

Additionally, O'Gorman proposes that the Legislature intended for sex trafficking to apply only to a defendant who engages in violence, coercion, or threats of violence to induce a child to become a prostitute, which he argues does not apply to the "exclusive, and intimate relationship" he had with S.B. in which he was *paying* S.B., not profiting off her. Here again, O'Gorman is incorrect. When the Legislature created the crime of sex trafficking in 2013, it included these violence and coercion requirements for the crime of sex trafficking of *an adult.* NRS 201.300(2)(a)(3) ("A person . . . is guilty of sex trafficking if the person . . . by threats, violence,

force, intimidation, fraud, duress, coercion . . . takes, places, harbors, induces, causes, compels or procures a person to engage in prostitution."). However, it did not include any such requirements for the crime of sex trafficking of *a child,* NRS 201.300(2)(a)(1), and the legislative history indicates that the Legislature drew a hard line regarding the sex trafficking of children such that threats and violence are not required when a child is involved. Hearing on A.B. 67 Before the Joint Senate & Assembly Judiciary Comms. 77th Leg. (Nev., Feb. 20, 2013); Hearing on A.B. 67 Before the Senate Judiciary Comm. 77th Leg. (Nev., May 28, 2013). In fact, legislators specifically acknowledged that a customer of a minor, even a minor who is 17 years old, could be liable for sex trafficking, particularly when he solicits the minor for sex more than once. Furthermore, as to O'Gorman's argument that he did not profit off S.B. but in fact paid her, NRS 201.300(2)(a)(1) does not require the defendant to have profited off the child. Therefore, the State was not required to demonstrate that O'Gorman engaged in violence or threats or profited off S.B. to sustain a conviction for sex trafficking of a child.

Under the statute, both as it is written and with the legislative history in mind, when viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of sex trafficking of a minor were proven beyond a reasonable doubt. Accordingly, we find that the evidence is more than sufficient to support O'Gorman's conviction of sex trafficking a minor.

The evidence is sufficient to sustain the conviction of use of a minor as the subject of sexual portrayal in a performance

NRS 200.710 provides that a person is guilty of the unlawful use of a minor as the subject of sexual portrayal in a performance if the person: (1) "knowingly uses, encourages, entices or permits a minor to

simulate or engage in . . . sexual conduct to produce a performance . . ."; or (2) "knowingly uses, encourages, entices, coerces or permits a minor to be the subject of a sexual portrayal in a performance." O'Gorman argues that S.B. sent him explicit images of her own volition and therefore the evidence is insufficient to find that he "use[d], encourage[d], entice[d] or permit[ed]" her to engage in sexual conduct pursuant to NRS 200.710(1). He argues that other courts have found that a conviction under similar statutes requires more than simply asking for an explicit photo. *See, e.g., United States v. Streett*, 83 F.4th 842, 854 (10th Cir. 2023) (interpreting a similar federal statute and determining that merely asking a minor for a nude photo was insufficient for a conviction; rather, there must be an additional element of psychological or physical pressure exerted by the defendant).

O'Gorman has failed to show that the evidence was insufficient to warrant a conviction. It is apparent that by repeatedly asking underage S.B. to produce explicit photos and videos of herself, O'Gorman encouraged, enticed, and, at the very least, permitted her to produce a sexual performance. As Tenth Circuit decisions are not binding on this court, the heightened standard of psychological or physical pressure from *Streett* is not required here, although if it was, O'Gorman's promise of money and gifts arguably supplies such pressure.

Finally, and unpersuasively, O'Gorman suggests that the exchanging of nude photographs is a common occurrence in contemporary society, and that NRS 200.727(1) criminalizes the sending of such photos only when the subject is under the age of 16. He argues that if the sending of the photos was viewed under this statute, no one would have been at fault because S.B. was 17, over the statutory age. This argument is unpersuasive, as O'Gorman was not convicted of a violation of NRS 200.727,

and thus his contention that the elements of that statute were not proven is irrelevant to whether the elements of NRS 200.710 were proven.[2] Again, in viewing the evidence in the light most favorable to the prosecution, we conclude that the evidence is more than sufficient to sustain O'Gorman's conviction of use of a minor as the subject of sexual portrayal in a performance.

The trial court did not abuse its discretion by admitting evidence of O'Gorman's posts on sugar dating websites

O'Gorman challenges the admissibility of six conversations he had online with potential "sugar babies," in which he offered money for sexual encounters with women and minors. He argues that the messages are evidence of his prior bad acts and were improperly admitted for propensity purposes. The state initially introduced thirty-four such conversations into the record and the district court admitted six conversations after conducting a *Petrocelli* hearing. The court determined that admission of all thirty-four would be overly prejudicial but determined that six were sufficient to present relevant evidence showing O'Gorman's knowledge, plan, opportunity, and motive in initiating a sexual, transactional relationship with S.B. *See* NRS 48.045 (2); *see also Petrocelli v. State*, 101 Nev. 46, 692, P.2d 503 (1985).

A district court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). Under NRS 48.045(1), evidence of other crimes or wrongs is inadmissible if offered to show a character trait or propensity

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[2] NRS 200.727 does not provide a different definition of "minor" but instead creates a separate crime of "[u]se of Internet to control visual presentation depicting sexual conduct of a person under 16 years of age."

to commit similar acts. However, these acts are admissible for other purposes such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." NRS 45.045(2); *Bigpond v. State*, 128 Nev. 108, 116, 270 P.3d 1244, 1249 (2012). When determining whether to admit this type of nonpropensity evidence, a court must consider whether: "(1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *Bigpond*, 128 Nev. at 117, 270 P.3d at 1250 (citing *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)).

Considering the *Tinch* factors, we conclude that the district court did not abuse its discretion in determining that the messages were admissible to show O'Gorman's knowledge, plan, opportunity and motive in initiating a relationship with S.B. The messages were relevant to the charged crime because they showed that O'Gorman had the intent to pay young women and children for sex, which contradicts O'Gorman's defense at trial that S.B. was simply his girlfriend to whom he gave money and gifts as a token of his affection, not as payment for sex. The texts were taken from his electronic devices, and O'Gorman does not dispute that they were proven by clear and convincing evidence. Lastly, the admitted conversations refuted the defense's position that the relationship O'Gorman sought and established with S.B. was affectionate, not transactional. Balancing the probative value against prejudicial effect, the district court limited the number of such conversations it admitted and, in so doing, appropriately exercised its discretion. Therefore, the district court did not abuse its discretion by admitting the evidence of these conversations.

The trial court did not abuse its discretion by refusing to give O'Gorman's "theory of the case" jury instruction

O'Gorman argues, citing *Brooks v. State*, 103 Nev. 611, 613, 747 P.2d 893, 895 (1987), that the trial court improperly declined to give his proposed "theory of the case" instruction. He argues that the jury instructions that were ultimately presented at trial were an insufficient replacement because they did not "fully cover" O'Gorman's proposed instruction, as required by this court in *Milton v. State*, 111 Nev. 1487, 1492, 908 P.2d 684, 687 (1995).

A district court's refusal to give a jury instruction is reviewed for an abuse of discretion or judicial error. *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). A defendant has the right to a jury instruction on his theory of the case as supported by the evidence. *Brooks v. State*, 124 Nev. 203, 211, 180 P.3d 657, 662 (2008); *see also Milton*, 111 Nev. at 1492, 908 P.2d at 687. O'Gorman's proposed instruction included that he and S.B. "engaged in a consensual, lawful, caring, supportive and romantic relationship" and that "[t]his was not prostitution but rather a relationship where there were mutual emotional, caring, giving and loving components to their relationship." It further provided, as to Count 2, that S.B. decided on her own to take unsolicited photos and videos and send them to O'Gorman, without any encouragement by O'Gorman.

The State objected to this instruction on the basis that it was a proposed statement of fact, not of law. The trial court agreed, labeling it an "argument in the form of an instruction" and declining to give the instruction. We discern no abuse of discretion. O'Gorman's proposed jury instruction was not a theory of the case as it did not explain the elements of the charged crimes nor how a jury might determine if O'Gorman's actions triggered those elements. Rather, the instruction argued O'Gorman's

interpretation of the facts, which is not proper in a jury instruction. The district court therefore did not abuse its discretion in rejecting O'Gorman's jury instruction.

The trial court did not abuse its discretion by allowing the victim to testify as to her psychological conditions

O'Gorman argues that evidence of S.B.'s psychological conditions was improperly admitted because it was overly prejudicial and admitted purely to "garner an emotional and sympathetic response from the jury." Additionally, he argues that the evidence was inadmissible double hearsay because it was a school record recorded by an unnamed person, not an identified medical professional. O'Gorman did not raise either objection at trial.

When an objection to the admission of evidence is not preserved at trial, it may be reviewed by an appellate court for plain error affecting the defendant's substantial rights. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). To demonstrate plain error, the defendant bears the burden of showing that "(1) there was an 'error'; (2) the error is 'plain,' meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). Evidence is relevant when it tends to make a fact of consequence more or less true, and its probative value outweighs its prejudicial effect. NRS 48.015. O'Gorman has not met his burden to demonstrate that his substantial rights were affected by the exclusion of this evidence. While evidence of a psychological disorder may tend to make S.B. appear more sympathetic, the evidence was also relevant to the harm element of the child abuse charge that O'Gorman was acquitted of. O'Gorman has not successfully argued that the inclusion

of this evidence rises to the level of plain error. Therefore, the district court did not err in admitting the evidence of S.B.'s psychological conditions.

For the foregoing reasons, we conclude no relief is warranted and we therefore

ORDER the judgment of conviction AFFIRMED.

Pickering, J.
Pickering

Cadish, J.
Cadish

Lee, J.
Lee

cc: Hon. Barry L. Breslow, District Judge
Richard F. Cornell
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk