

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALLAN RICHARD WILSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38316

FILED

DEC 11 2002

ORDER OF AFFIRMANCE

JANETTE M. FLOOM
CLERK OF SUPREME COURT
J. Richards
CHIEF CLERK

Allan Richard Wilson appeals his judgment of conviction for first-degree kidnapping, indecent exposure, lewdness with a child under the age of fourteen years and possession of a controlled substance. We conclude that none of Wilson's arguments have merit, and accordingly, we affirm his conviction.

First, Wilson asserts that the district court abused its discretion when it admitted the victim's prior out-of-court statements to the police as prior consistent statements under NRS 51.035(2)(b) and as prior inconsistent statements under NRS 51.035(2)(a).

We conclude that the district court did not abuse its discretion. The victim's prior inconsistent statements were admissible pursuant to NRS 51.035(2)(a) because her trial testimony was inconsistent with earlier statements she had made regarding where Wilson touched her. We note that the victim was subject to cross-examination, and the prosecutor gave her an opportunity to explain or deny the prior statements.

Concerning the admission of the victim's prior consistent statements, we note that Wilson had raised the implication that the victim falsified her trial testimony because of pressure exerted upon her by police officers investigating the case shortly after the crime occurred and also because of the tactics of the prosecutor at trial. Since there were two alleged influences upon the truthfulness of the victim's trial testimony, the issue becomes whether the trial court abused its discretion by admitting

prior consistent statements to rebut the later alleged influence, despite the existence of the earlier alleged influence.

We addressed this same issue in Cunningham v. State.¹ In Cunningham, the district court admitted evidence of a child's prior consistent statements to her mother regarding sexual abuse by her stepfather to rebut her stepfather's charge that the child's mother had improperly influenced the child shortly before trial.² The child's stepfather objected to the admission of the statements on the ground that the child already had a prior motive to fabricate when she made the prior consistent statements to her mother.³ We affirmed the decision of the district court stating:

Since NRS 51.035(2)(b) was designed to rebut charges of fabrication or improper influencing arising after a prior consistent statement was made, the rationale or purpose behind the statute was clearly served by the introduction of the prior consistent statement in this case to rebut the latter charge of improper influencing; the fact that there was another motivation to fabricate, which happened to arise before the prior consistent statement had been made, does not diminish the rehabilitative value of the statement. As such, the district court did not err in admitting the statement.⁴

¹100 Nev. 396, 683 P.2d 500 (1984).

²Id. at 398, 683 P.2d at 501.

³Id. at 398-99, 683 P.2d at 501.

⁴Id. at 399, 683 P.2d at 502.

Here, the victim's statements to the police had rehabilitative value for rebutting the charge that the prosecutor had improperly influenced her at the time of trial, and so were properly admitted.

Second, Wilson asserts that the district court abused its discretion by admitting the victim's testimony because she was not competent to testify as demonstrated by several inconsistencies in her testimony.

A district court's finding of competency will not be disturbed on appeal absent an abuse of discretion.⁵ A child will be considered competent to testify if "she is able to receive just impressions and relate them truthfully."⁶ In determining whether a child is competent to testify, a court should consider:

- (1) the child's ability to receive and communicate information;
- (2) the spontaneity of the child's statements;
- (3) indications of "coaching" and "rehearsing;"
- (4) the child's ability to remember;
- (5) the child's ability to distinguish between truth and falsehood; and
- (6) the likelihood that the child will give inherently improbable or incoherent testimony.⁷

A finding of competency is in order when a child's testimony is "clear, relevant, and coherent."⁸ Inconsistencies in a child's testimony go to the weight to be given to the testimony, not a finding of incompetency.⁹

⁵Lanoue v. State, 99 Nev. 305, 307, 661 P.2d 874, 874 (1983).

⁶Evans v. State, 117 Nev. 609, 624, 28 P.3d 498, 509 (2001).

⁷Id.

⁸Id.

⁹Id.

The district court did not abuse its discretion in concluding that the victim was competent to testify since the victim demonstrated that she knew the difference between the truth and a lie, and she gave a coherent account of what happened on the night of the alleged crime. The jury was in the best position to weigh any inconsistencies in the victim's testimony.¹⁰

Third, Wilson asserts that there was insufficient evidence to support his conviction for first-degree kidnapping or his conviction for lewdness with a child under the age of fourteen because there was no conclusive evidence that he intended to abuse the victim when she first got into his truck or that he had a lewd intent when he touched her chest. We conclude that there was substantial evidence to support Wilson's conviction for first-degree kidnapping and lewdness with a child under the age of fourteen. A person's intent may be inferred from his conduct.¹¹ Here, there was detailed testimony from the victim describing how Wilson offered to help her, drove her to an isolated hilltop to supposedly look for her guinea pig, told her sexual stories, removed his pants, asked her to touch his penis and masturbated in front of her.¹² Additionally, the victim repeatedly demonstrated for the jury how Wilson rubbed her chest.

¹⁰See Middleton v. State, 114 Nev. 1089, 1102-03, 968 P.2d 296, 306 (1998).

¹¹Cooper v. State, 94 Nev. 744, 745, 587 P.2d 1318, 1319 (1978) (holding that the jury could infer that the defendant had a specific intent to kill the victim because the defendant had turned and fired his gun at the victim).


¹²Wilson himself admitted to his roommate that he convinced a young girl to get into his truck, drove her around and eventually masturbated in front of her.

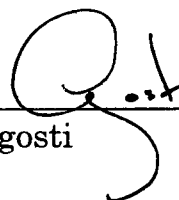
Finally, Wilson asserts that the district court abused its discretion by refusing to give an advisory verdict because there was insufficient evidence to support his conviction for lewdness with a child under the age of fourteen. Under NRS 175.381(1), a district court is permitted to advise the jury to acquit a defendant if the court believes that the evidence is insufficient to warrant a conviction; however, the jury is not bound by the district court's advice. This court will not overturn a district court's decision to grant or not grant an advisory verdict absent an abuse of discretion.¹³ The district court did not abuse its discretion when it refused to give the jury an advisory verdict because the victim's testimony provided sufficient evidence with which to conclude that Wilson was guilty beyond a reasonable doubt.¹⁴

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 _____, C.J.
Young

 _____, J.
Rose

 _____, J.
Agosti

¹³Milton v. State, 111 Nev. 1487, 1493, 908 P.2d 684, 688 (1995).

¹⁴See State v. Gomes, 112 Nev. 1473, 1481, 930 P.2d 701, 706 (1996) (noting that “[a] sexual assault victim's uncorroborated testimony is sufficient evidence to convict”).

cc: Hon. James W. Hardesty, District Judge
Washoe County Public Defender
Attorney General
Washoe County District Attorney
Washoe District Court Clerk