IN THE SUPREME COURT OF THE STATE OF NEVADA

ROLAND WALTER JENKINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39989

FILED

JAN 0 8 2004

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of lewdness with a child under the age of fourteen. Appellant, Roland Jenkins was sentenced to life imprisonment with minimum parole eligibility in ten years.

Testimony at trial indicated Jenkins fondled the six-year old victim's vagina while he babysat the victim overnight at his residence. The next morning, the victim reported the incident to her mother as the two departed the Jenkins' residence. Jenkins was charged with, alternatively: (1) sexual assault of a child under the age of fourteen, (2) lewdness with a child under the age of fourteen, or (3) attempted sexual assault of a child under the age of fourteen.

Jenkins denied that the events happened and alleged that the child had been coached to raise false allegations because the child's mother was angry with Jenkins. A primary part of Jenkins' defense involved attacking the sufficiency of the police investigation and coaching of the victim. Jenkins hired an expert on police investigation, Wysocki & Associates, to show inadequacies in the investigation. Jenkins also hired a child psychologist to discuss the effect multiple interviews have on the validity of a child's perceptions and statements. Jenkins was allowed to present testimony from the psychologist, but not the police expert.

Additionally, Jenkins sought permission to have a psychological evaluation performed on the victim, which was denied.

Prior to his arrest, Jenkins gave two tape-recorded interviews to the police. In the first, Jenkins was not read his Miranda rights,[1] denied ever touching the victim, and stated that he assumed the victim's mother made up the allegations in order to get even with him for allowing the victim to be around one of his friends, with whom the mother had a work-related dispute. At the close of this interview, Jenkins asked about retaining an attorney. The officers ignored his request, however, the only information solicited after this exchange was to clarify that Jenkins would not take a voice stress test.

At the second interview, after being given his Miranda rights, Jenkins, in response to questions about the victim's truthfulness, indicated he had always found the victim to be a truthful child, and if he were the police, he would believe the child.

During both interviews, police falsely asserted that a fingerprint had been lifted from the victim's vaginal area and that the fingerprint would be compared to Jenkins'.

Jenkins challenged the admissibility of the statements, however, the district court admitted Jenkins' statements, finding that the interviews were noncustodial and voluntary and that Jenkins' request for counsel during the second interview was ambiguous.

During the three-day trial, the State presented evidence from the victim, several of the people who spoke with the victim regarding the incident, and from the medical professionals who examined the victim

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[1]Miranda v. Arizona, 384 U.S. 436 (1966).

after the occurrence of the incident. Dr. Scoccia, who examined the victim the day of the incident, testified that the victim had informed him that her babysitter had touched her private parts. Dr. Scoccia testified that an examination of the inner labia revealed a red, irritated, and inflamed circumferential pattern that was consistent with sexual assault. Phyllis Suiter, a pediatric nurse for the SAINT program, who examined the victim several days after the incident, testified that the victim's external and internal genitalia were unremarkable, or normal.

The jury found Jenkins guilty of attempted sexual assault of a child under fourteen and of lewdness with a child under the age of fourteen. The district court concluded the conviction for attempted sexual assault of a child under fourteen was redundant and Jenkins was only sentenced on the lewdness with a child count. On appeal, Jenkins asserts six errors by the district court.

First, Jenkins argues that the district court abused its discretion by refusing to allow Jenkins to present expert testimony from Wysocki & Associates. Jenkins argues he was denied the sole means to meaningfully attach the weakest link in the State's case, the caliber and quality of the police investigation. We disagree.

"The admissibility of expert testimony is within the discretion of the trial court."[2] This court will not disturb a district court's

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[2]Mortensen v. State, 115 Nev. 273, 281, 986 P.2d 1105, 1111 (1999).

determination absent a clear abuse of discretion.[3] An appellant must show how he or she was prejudiced by the denial of the testimony.[4]

Jenkins' counsel cross-examined the State's witnesses regarding the investigation conducted in this case. Jenkins presented his theory of the case through cross-examination, the testimony of the child psychologist, and his own testimony. The district court determined, based on a report prepared by Wysocki & Associates, that any testimony from the police expert would be cumulative. In addition, the child psychologist was allowed to refer to the Wysocki critique of the police investigation in her testimony. We conclude the district court did not clearly abuse its discretion by refusing to admit the testimony from Wysocki & Associates and Jenkins was not denied an opportunity to present his theory of the case.

Second, Jenkins argues the district court abused its discretion by denying his motion for a psychiatric evaluation of the victim. We disagree. Recently, this court articulated the controlling test for determining when a district court should order a psychological evaluation of a sexual assault victim.[5] The defendant has the burden to present a compelling reason for the examination.[6] Whether a compelling need exists is resolved by examining the following three factors:

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[3]Vallery v. State, 118 Nev. 357, 371, 46 P.3d 66, 76 (2002); Allen v. State, 99 Nev. 485, 487, 665 P.2d 238, 239 (1983).

[4]Vallery, 118 Nev. at 371, 46 P.3d at 76.

[5]Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000) (overruling Keeney v. State, 109 Nev. 220, 850 P.2d 311 (1993)).

[6]Id. at 1116, 13 P.3d at 455.

> Whether the State actually calls or obtains some benefit from an expert in psychology or psychiatry, whether the evidence of the offense is supported by little or no corroboration beyond the testimony of the victim, and whether there is a reasonable basis for believing that the victim's mental or emotional state may have affected his or her veracity.[7]

In this case, the district court found that Jenkins had not met his burden to show a compelling reason for the evaluation. However, the district court did authorize Jenkins to hire Dr. Richitt, a clinical psychologist, to testify regarding the investigation and some concerns regarding multiple interviews of a child victim. In denying Jenkins' motion to have the victim evaluated, the district court carefully evaluated the relevant factors. We conclude that due to the district court's careful consideration of the relevant factors, the district court did not abuse its discretion by denying Jenkins' request to have a psychological evaluation performed on the victim.

Third, Jenkins argues the district court abused its discretion by concluding that Jenkins' statements to the police were admissible. Jenkins claims he invoked his right to counsel, and therefore, the statements were inadmissible. We disagree.

This court will not disturb the district court's determination of whether the defendant is in custody where that determination is supported by substantial evidence.[8] An individual is deemed in custody where "there has been a formal arrest, or where there has been restraint

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[7]Id. at 1117, 13 P.3d at 455.

[8]Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 252 (1996).

on freedom of movement of the degree associated with a formal arrest so that a reasonable person would not feel free to leave."[9] To ascertain "whether a custodial interrogation has taken place, a court must consider the totality of the circumstances, including the site of the interrogation, whether the objective indicia of an arrest are present, and the length and form of questioning."[10]

In this case, the district court held a lengthy hearing in which several police officers testified regarding the circumstances of Jenkins' interviews. At the conclusion of the hearing, the district court found that the interview was noncustodial, the statements were voluntary, and the request for counsel was ambiguous. Although we conclude that the district court erred in finding the request for counsel was ambiguous, this came at the conclusion of the first interview. After being mirandized at the second interview, conducted days after the first, Jenkins did not request an attorney. Accordingly, we conclude that the record supports the district court's findings regarding the non-custodial and voluntary nature of the interviews and any admitted statements. Therefore, we conclude the district court did not abuse its discretion in admitting the statements.

Fourth, Jenkins asserts that the district court abused its discretion by denying two of Jenkins' proffered jury instructions and Jenkins' objection regarding a third instruction. "We have consistently held that it is not error to refuse to give an instruction when the law encompassed therein is substantially covered by another instruction given

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[9]State v. Taylor, 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998).

[10]Id. at 1081-82, 968 P.2d at 323 (citations omitted).

to the jury."[11] Even where it was error to admit a particular jury instruction, such error is harmless where sufficient evidence is adduced of defendant's guilt.[12]

The first instruction concerned the deception used by the police in interviewing Jenkins. Jenkins requested that the jury be instructed that the jury could consider the false statements of the police officer in weighing the credibility of the officer's trial testimony. Jenkins also objected to the instruction 9A which informed the jury that a police officer's deceptive practices during an interview is insufficient, standing alone, to make a defendant's statement involuntary.

"Police deception is a relevant factor in determining whether or not a confession is voluntary. However, an officer's lie about the strength of the evidence against the defendant is, in itself, insufficient to make the confession involuntary."[13] The court must consider the effects on the totality of the circumstances.[14]

The district court offered the jury an instruction summarizing the law from Sheriff v. Bessey and both parties were allowed to argue the appropriateness or inappropriateness of the officer's deception. Additionally, although the officer admitted to using deception in his interview with Jenkins, the officer only minimally referenced the evidence and never stated the fingerprint matched Jenkins' fingerprint. Therefore,

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[11]Ford v. State, 99 Nev. 209, 211, 660 P.2d 992, 993 (1983).

[12]Guy v. State, 108 Nev. 770, 777-78, 839 P.2d 578, 583 (1992).

[13]Sheriff v. Bessey, 112 Nev. 322, 325, 914 P.2d 618, 619 (1996) (citation omitted).

[14]Id. at 324, 914 P.2d at 619.

we conclude that the jury was properly instructed on deception used in interviews. In addition, the jury received a standard instruction on witness credibility indicating if a witness has lied about any material statement, it may be used in determining the witness' credibility. Thus, the district court did not abuse its discretion by refusing Jenkins' proffered instruction.

Jenkins also argues that the district court abused its discretion by refusing to instruct the jury on open or gross lewdness as a lesser-related offense. A district court may not offer an instruction on a lesser-related offense,[15] therefore, the district court did not abuse its discretion by refusing to offer Jenkins' proposed instruction on the lesser-related offense of open or gross lewdness.

Fifth, Jenkins argues the district court abused its discretion by sentencing Jenkins for the offense that carried the heavier penalty, lewdness with a child under the age of fourteen. Jenkins claims he should have been sentenced for the offense that carried the lesser offense, attempted sexual assault of a child under the age of fourteen. We disagree.

"A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."[16] Jenkins did not argue at his sentencing hearing that he should have been sentenced for attempted sexual assault of a child under the age of fourteen. On the contrary, Jenkins argued that the two

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

[16]Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

offenses of which he had been convicted should be merged and that he should be sentenced in accordance with the statutory sentence for lewdness with a child under the age of fourteen. We find that the district court properly sentenced Jenkins to only one of the offenses for which he had been convicted. Additionally, we do not find Jenkins' sentence for lewdness with a child under the age of fourteen to be improper.

Sixth, and finally, Jenkins argues insufficient evidence was adduced to support his conviction for lewdness with a child under the age of fourteen. We disagree. "The question for the reviewing court is 'whether, 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.'"[17] The jury determines the weight and credibility to give conflicting testimony.[18]

In this case, the victim testified as to the incident and the emergency room physician testified that he was very confident the victim had been vaginally penetrated. Even Jenkins stated that he would believe the victim one hundred percent and he had never known her to lie. A rational trier of fact could have clearly concluded that Jenkins had engaged in the charged acts. Therefore, we find there is sufficient evidence to sustain Jenkins' conviction for lewdness with a child under the age of fourteen.

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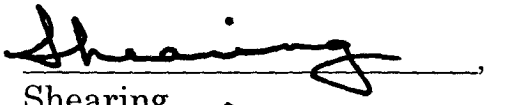
[17]Mason v. State, 118 Nev. ___, ___, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307 (1979)).

[18]Deeds v. State, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981).

ORDER the judgment of the district court AFFIRMED.



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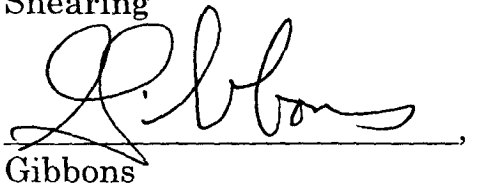

_____, J.
Gibbons

cc: Hon. Robert W. Lane, District Judge
Nye County Public Defender
Attorney General Brian Sandoval/Carson City
Nye County District Attorney/Tonopah
Nye County Clerk

BECKER, J., concurring:

I concur with the majority that the judgment of conviction be affirmed. I write separately only to indicate my disagreement with the majority's analysis regarding the deceptive interview practices instruction. Sheriff v. Bessey demonstrates that deception in an interview is insufficient by itself to show a statement is involuntary, however, "police deception is a relevant factor in determining whether or not a confession is voluntary."[1] Instruction 9A failed to include the additional language of Bessey indicating an officer's deceptive interview techniques are relevant, under the totality of the circumstances, in determining the voluntariness of Jenkins' statement. I therefore conclude that the instruction was improper.

However, the theory was argued to the jury, and based upon the evidence, including the extensive record on the issue of the voluntary nature of the statements, I further conclude that any error was harmless beyond a reasonable doubt.

Becker, J.
Becker

[1]Sheriff v. Bessey, 112 Nev. 322, 325, 914 P.2d 618, 619 (1996).