IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID LEE SIEWERT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40019

FILED

FEB 18 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 lewdness with a child under the age of fourteen years. Appellant David Siewert was sentenced to a term of life with the possibility of parole after ten years. Siewert's conviction was based on an incident with his then eight-year-old daughter.

At trial, Siewert asked his wife Jade Siewert on cross-examination, "Other than the incident that you are now claiming happened [with the victim], [Siewert] was a good father?" Jade responded, "For the most part, yes, I would say good father."

Based on Siewert's inquiry, the district court allowed the following rebuttal inquiry. On redirect, the State asked Jade, "Are you aware of any other allegations involving any other child in the family, other than [the victim], concerning sexual misconduct?" Jade testified that she was aware of two accusations involving sexual misconduct between Siewert and her oldest son. No testimony was adduced regarding specific details of the allegations.

Because the victim was nine years old at the time of trial, the district court conducted a competency hearing outside the presence of the jury. The district court concluded that the nine-year-old victim was competent to testify, finding no indication of coaching.

Siewert first argues that the district court erred by allowing rebuttal character evidence of prior allegations of sexual misconduct involving Siewert and Jade's oldest son. We disagree.

The determination of whether to admit evidence is within the sound discretion of the district court, and that determination will not be disturbed unless manifestly wrong.[1] NRS 48.045(1)(a) permits admission of character evidence when a defendant offers his good character into evidence and the prosecution introduces evidence to rebut the defense.[2] Evidence of specific acts is admissible only upon cross-examination or when the defendant's character is an essential element of the charge.[3]

By asking Jade whether he was a good father other than the charged incident, we conclude that Siewert offered his good character as a father and opened the door to rebuttal character evidence. We conclude that the district court did not abuse its discretion by allowing rebuttal character testimony of prior allegations of sexual misconduct involving Siewert and Jade's oldest son.

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[1]Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985).

[2]Roever v. State, 114 Nev. 867, 871, 963 P.2d 503, 505 (1998). NRS 48.045(1) states, in pertinent part:

> Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (a) Evidence of his character or a trait of his character offered by an accused, and similar evidence offered by the prosecution to rebut such evidence.

[3]Roever, 114 Nev. at 871, 963 P.2d at 505.

Siewert also argues that the nine-year-old victim's testimony was sufficiently coached and/or rehearsed to warrant reversal.[4] We disagree.

This court will not disturb a finding of competency to testify absent a clear abuse of discretion.[5] Courts must evaluate a child's competency on a case-by-case basis, but relevant considerations include:

> (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.[6]

In this case, the district court determined that the nine-year-old victim was competent to testify. At trial, the victim testified that her mother and cousin read her previous statements to her one time from police reports and her previous testimony, and the prosecutor also read her previous statements to her one time. The victim testified that they told her that she should say the same thing when she testified at trial.

We conclude that reading a child witness' prior statements to her a total of two times and instructing her to tell the same thing in open court is nothing more than adequate trial preparation of a witness and

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[4]Siewert admits, and we agree, that the nine-year-old victim's testimony was clear, relevant, and coherent.

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

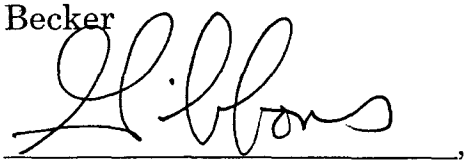
[6]Evans v. State, 117 Nev. 609, 624, 28 P.3d 498, 509 (2001) (holding that a child is competent to testify if he is able to receive just impressions and relate them truthfully).

does not rise to the level of reversible coaching and/or rehearsing. We further conclude that nothing in the record indicates that the victim's testimony was sufficiently coached and/or rehearsed to warrant reversal. Thus, we conclude the district court did not abuse its discretion by determining that the victim was competent to testify. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Shearing

_____, J.
Becker



_____, J.
Gibbons

cc: Hon. Robert W. Lane, District Judge
Rick Lawton
Attorney General Brian Sandoval/Carson City
Mineral County District Attorney
Mineral County Clerk