

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH ROSE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40212

FILED

MAY 18 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Rubard*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of first-degree kidnapping and lewdness with a child under the age of fourteen years. The district court adjudicated appellant Kenneth Rose as a habitual criminal and sentenced him to serve two consecutive prison terms of life with parole eligibility in 10 years.

Rose was charged with kidnapping and lewdness with a minor for abducting the victim, a nine-year-old girl, from the arcade at a Circus Circus Hotel and Casino and then touching her on the upper inner thigh near the genital area in a sexual manner. At trial, the victim testified that, on November 11, 2001, she was separated from her mom at the arcade and started crying. Rose, who the victim did not know, approached her, took her by the hand and offered to help her; he then led her outside the casino down a staircase, behind a trash can to "a very dark place." According to the victim, Rose offered her a seat on his knee, started rubbing the victim between her upper thighs, and asked her, "Does that feel good?" When uniformed security approached, Rose stood the victim up, took her by the hand, and started leading the victim away from the security officer. In addition to the victim, two tourists testified at trial, describing how they witnessed Rose touching the victim inappropriately

and immediately contacted security. Finally, the victim's mother also testified at trial, stating that the victim, who was upset and crying, told her that Rose touched her on the upper inner thigh.

Rose's sole contention is that the district court erred in admitting the child-victim's hearsay statement under NRS 51.385 because it is unreliable and untrustworthy. In particular, Rose contends that the child-victim's statement was not spontaneous because it was given forty-five minutes after the alleged touching occurred. Additionally, Rose contends that the child-victim's statement was untrustworthy because she "could [not] be considered by any stretch of the imagination to have been in a stable mental condition." We conclude that Rose's contention lacks merit.

A child-victim's statements describing a sexual assault are admissible at trial provided the child-victim testifies or is unavailable, and the district court finds after conducting a hearing that, under the totality of circumstances, the statement provided "sufficient circumstantial guarantees of trustworthiness."¹ Pursuant to NRS 51.385(2), "[i]n determining the trustworthiness of a statement, the court shall consider, without limitation, whether: (a) [t]he statement was spontaneous; (b) [t]he child was subject to repetitive questioning; (c) [t]he child had a motive to fabricate; (d) [t]he child used terminology unexpected of a child of similar age; and (e) [t]he child was in a stable mental state."

In applying the statutory factors set forth in NRS 51.385 to this case, we conclude that the district court did not abuse its discretion in

¹NRS 51.385(1)(a).

admitting the hearsay statement of the child-victim.² First, the child-victim's statement to her mother was made spontaneously while she was still upset about the incident and was not the result of repetitive or suggestive questioning.³ Second, there is no indication that the child-victim fabricated a story based on an improper motive, and in fact, she did not even know Rose prior to the incident. Third, the child-victim did not use terminology unexpected of a child of similar age, but instead pointed to her upper thigh when her mother asked her where Rose touched her.⁴ Finally, there is no indication that the child-victim was psychologically or mentally unstable, and, contrary to Rose's claim, the fact that the child-victim was upset and crying at the time she made the statements actually increases the likelihood that her statements were credible.⁵ Accordingly,

²Rose also contends that the district court erred in failing to discuss each of the mandatory statutory factors in NRS 51.385(2) on the record to allow Rose a "reasonable opportunity to oppose and object to such determining standards." We conclude that Rose's contention lacks merit because: (1) the district court gave Rose ample opportunity to argue that the child-victim's statements were inadmissible under the statutory factors; and (2) there is no additional requirement that the district court's consideration of each statutory factor should be set forth with specificity on the record. Further, errors involving compliance with NRS 51.385 are subject to a harmless-error analysis. See Braunstein v. State, 118 Nev. 68, 77, 40 P.3d 413, 420 (2002).

³Cf. Felix v. State, 109 Nev. 151, 179-87, 849 P.2d 220, 239-44 (1993) (discussing how suggestive questioning of child-victim witness can render the statement unreliable).


⁴Cf. id.


⁵See Braunstein, 118 Nev. at 78, 40 P.3d at 420 (concluding that the fact that the child-victim was upset and crying seemed "very appropriate to the circumstances and [was] an indication of credibility").

we conclude that the child-victim's statements were admissible under the hearsay exception set forth in NRS 51.385.

Having considered Rose's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. Donald M. Mosley, District Judge
Law Offices of Barry Levinson
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk