

IN THE SUPREME COURT OF THE STATE OF NEVADA

PEDRO ESTEBAN A/K/A PEDRO
LOPEZ A/K/A PEDRO ESTEBAN
LOPEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41423

FILED

SEP 03 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of twenty-four counts of sex-related crimes. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Appellant, Pedro Esteban, was convicted of nine counts of lewdness with a minor under age fourteen; one count of attempted lewdness with a minor under age fourteen; two counts of incest; ten counts of sexual assault with a child under age fourteen; and two counts of battery with the intent to commit a crime. The district court sentenced Esteban to nineteen life sentences with parole eligibility after sixty-eight years. Esteban raises the following arguments on appeal: (1) the district court erred in refusing to issue two proposed jury instructions regarding good character evidence; (2) the district court erred in issuing jury instruction number ten without providing an additional paragraph regarding Esteban's testimony; (3) the district court erred in refusing to allow defense witness, Maria Angeles-Ramirez, to testify about her previous experience with sexual abuse; (4) the district court erred in refusing to allow defense witness, Damian Hernandez-Romulo, to testify

about statements allegedly made to him by one of the child victims regarding her previous sexual experience in Mexico; and (5) the State adduced insufficient evidence at trial to sustain Esteban's convictions. We reject all of Esteban's arguments.

Jury instructions

Esteban contends that the district court erred in refusing to issue either of his two proposed good character jury instructions. Esteban also contends that the district court erred in failing to add additional language to jury instruction number ten. We disagree with Esteban's contentions.

We "review a district court's decision to give a particular [jury] instruction for an abuse of discretion or judicial error."¹ A district court abuses its discretion when its "decision is arbitrary or capricious or if it exceeds the bounds of law or reason."² In Williams v. State, we noted that "[a] defendant in a criminal case is entitled, upon request, to a jury instruction on his or her theory of the case, so long as there is some evidence, no matter how weak or incredible, to support it."³ However, in Barron v. State, we held that "if a proffered instruction misstates the law or is adequately covered by other instructions, it need not be given."⁴ NRS 175.161(2) provides that "[i]n charging the jury, the judge shall state to them all such matters of law he thinks necessary for their information in giving their verdict."

¹Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

²Id.

³99 Nev. 530, 531, 665 P.2d 260, 261 (1983).

⁴105 Nev. 767, 773, 783 P.2d 444, 448 (1989).

Good character jury instruction

At trial, several witnesses testified that Esteban was a person of good moral character. At the conclusion of trial, Esteban proposed two good character evidence jury instructions to the district court. The first jury instruction provided: "Good Character when considered in connection with the other evidence in the case, may generate a reasonable doubt sufficient to justify the jury in acquitting the defendant." The second jury instruction provided: "Opinions of the defendant's good character, when put in evidence, is a fact which the jury should consider with the other facts in the case and which, when so considered, may, like other facts, generate a reasonable doubt which would justify acquittal." The district court rejected both good character evidence jury instructions, and decided to provide the jury with an alternative jury instruction, which stated:

The degree of credit due a witness should be determined by his or her character, conduct, manner upon the stand, fears, bias, impartiality, reasonableness or unreasonableness of the statements he or she makes, and the strength or weakness of his or her recollections, are viewed in the light of all the other facts in evidence.

You have heard opinion evidence of the defendant's good character. You should consider such character evidence together with and in the same manner as all the other evidence in the case.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

Esteban contends that our decision in Emerson v. State⁵ requires the district court to issue one of his two proposed good character instructions. We disagree.

In Emerson, we noted that:

“It has long been the rule that it is the duty of the trial judge to instruct the jury in substance that reputation of the defendant’s good character, when put in evidence, is a fact which they should consider with the other facts in the case and which, when so considered, may, like other facts, generate a reasonable doubt which would justify acquittal.⁶

In Emerson, the jury convicted the appellant of forgery.⁷ Several witnesses testified that the appellant had “a reputation for honesty.”⁸ However, the district court declined to issue a good character jury instruction.⁹ We held that the district court’s failure to issue a good character jury instruction prejudiced the appellant because “[a]n element of the crime of forgery is the specific intent ‘to damage or defraud,’” and the State’s evidence was weak in proving that the appellant had that specific intent.¹⁰

⁵98 Nev. 158, 643 P.2d 1212 (1982).

⁶Id. at 161, 643 P.2d at 1214 (quoting Beddow v. State, 93 Nev. 619, 625, 572 P.2d 526, 529 (1977) (quoting United States v. Frischling, 160 F.2d 370, 370 (3rd Cir. 1947))).

⁷Id. at 159, 643 P.2d at 1212.

⁸Id. at 160, 643 P.2d at 1213.

⁹Id. at 162, 643 P.2d at 1214.

¹⁰Id. (quoting NRS 205.090).

The facts in Emerson are distinguishable from this case. In this case, Esteban's witnesses testified that he was an individual with good moral character. That testimony does not negate the elements of the crimes of sexual assault, lewdness with a minor, incest, or battery with the intent to commit a crime. Esteban's character witnesses did not testify about Esteban's sexual morality. In addition, the State adduced strong evidence of Esteban's guilt at trial. Therefore, we conclude that the district court did not err in refusing to issue Esteban's two proposed jury instructions on good character evidence.

Jury instruction number ten

Esteban contends that the district court erred in failing to add additional language to jury instruction number ten. Jury instruction number ten provided: "There is no requirement that the testimony of a victim of sexual offenses be corroborated, and her testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty." The additional paragraph Esteban wished to add to this jury instruction provided: "Likewise, there is no requirement that the testimony of the defendant be corroborated, and his testimony alone, if believed, is sufficient to create a reasonable doubt."

Esteban contends that the Alaska Supreme Court's decision in Burke v. State¹¹ supports his argument that the district court erred in failing to add that additional paragraph. We disagree.

In Burke, the Alaska Supreme Court held:

In our view, to instruct that a victim's testimony need not be corroborated by other evidence unduly emphasizes the lack of a need for

¹¹624 P.2d 1240 (Alaska 1980).

corroboration without similarly indicating that other witnesses' testimony need not be corroborated. Particularly where the defendant has given a statement or taken the stand, it would be prejudicial to indicate that the victim's testimony need not be corroborated without similarly indicating that the defendant's testimony need not be corroborated.¹²

Burke is an Alaska case that only has persuasive authority in Nevada. There is no case law in Nevada that states that it is prejudicial to refuse to provide a similar jury instruction regarding the defendant's testimony. Therefore, we conclude that the district court did not abuse its discretion in refusing to add Esteban's proposed paragraph to jury instruction number ten.

Previous sexual abuse

Esteban argues that the district court violated the Sixth Amendment of the United States Constitution in refusing to allow Angeles-Ramirez to testify about her previous experience with sexual abuse. We disagree.

At trial, Angeles-Ramirez testified that she previously babysat the child victims, E.E. and L.E. During redirect examination, Esteban's counsel asked Angeles-Ramirez why she refused to speak to the State's investigator in this case and she answered "[b]ecause I had experience." The State objected and the district court held a hearing outside the jury's presence.

Angeles-Ramirez testified outside the jury's presence that she did not speak to the investigator because when she was a child during a

¹²Id. at 1257.

trial with a family member “the DA twisted my words around and made it seem like I was saying things that I wasn’t and I didn’t want that to happen again.” Angeles-Ramirez answered in the affirmative when asked if she had previously “been the victim of sexual abuse.” Esteban’s counsel argued to the district court that he felt the jury should hear this evidence because someone that has been a sexual abuse victim “would be a person that’s more alert, more concerned about that particular issue than the normal person.” The district court held that the jury would not hear this evidence because it would “deter from the facts that are relevant or at issue before this jury.” The district court also held that this evidence would be “too time consuming.” The district court allowed Angeles-Ramirez to explain to the jury that the reason she did not talk to the State’s investigator was because she had a previous experience involving a prosecutor in another state who mixed up her words.

The Sixth Amendment to the United States Constitution provides, in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor.” However, NRS 48.035 provides:

1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.

2. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

NRS 48.015 provides that relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the

determination of the action more or less probable than it would be without the evidence.”

We have held that “[d]istrict courts are vested with considerable discretion in determining the relevance and admissibility of evidence.”¹³ “[T]his court will not overturn the district court’s exclusion of relevant evidence absent an abuse of discretion.”¹⁴

In the instant case, the district court held that allowing Angeles-Ramirez to testify about her previous sexual abuse would be too time consuming and would detract from the relevant evidence in this case. However, the district court allowed Angeles-Ramirez to explain that she did not talk with the State’s investigator because she had previously had a bad experience with a district attorney in another state. We conclude that this explanation allowed Angeles-Ramirez to clarify to the jury why she did not wish to speak to the investigator. Therefore, we conclude that the district court did not abuse its discretion in refusing to admit evidence of Angeles-Ramirez’s previous experience with sexual abuse.

Previous statements

Esteban contends that the district court erred in disallowing Hernandez-Romulo to testify about previous statements E.E. allegedly revealed to him regarding her previous sexual experience with boys in Mexico. We disagree.

At trial, E.E. answered “[n]o” when asked if she had previously told Hernandez-Romulo that she had had sex with other boys

¹³Castillo v. State, 114 Nev. 271, 277, 956 P.2d 103, 107-08 (1998).

¹⁴Hansen v. Universal Health Servs., 115 Nev. 24, 27, 974 P.2d 1158, 1160 (1999).

in Mexico. During Hernandez-Romulo's testimony, the district court held a hearing outside the jury's presence regarding whether Hernandez-Romulo could testify about E.E. allegedly telling him that she previously had sex with other boys in Mexico.

NRS 51.035 provides that "Hearsay" means a statement offered in evidence to prove the truth of the matter asserted unless: . . . 2. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is: (a) Inconsistent with his testimony."

Even if E.E.'s alleged statements were admissible as non-hearsay, pursuant to NRS 51.035(2)(a), we conclude that the overwhelming evidence in this case renders this error harmless.

Substantial Evidence

Esteban contends that there was insufficient evidence adduced at trial to sustain his convictions. We disagree.

At trial, E.E. and L.E. testified that Esteban sexually abused them. E.E. answered affirmatively when asked if the sexual abuse happened every month from September 2000 through 2002. Phyllis Suiter, an expert in the area of child sexual examination, testified that she performed medical exams on E.E. and L.E. on May 14, 2002. Suiter testified that her ultimate finding after examining E.E. is that there "was clear evidence of a penetrating injury to the hymen, and this was consistent with her history and indicative of sexual abuse. Suiter answered affirmatively when asked if she "found the absence of hymenal tissue also on [L.E.]." Suiter also answered affirmatively when asked if it was her opinion that "this absence of hymenal tissue . . . [was] based on repeated penetration."

“The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant’s guilt beyond a reasonable doubt.”¹⁵ “[T]he test . . . is not whether this court is convinced of the defendant’s guilt beyond a reasonable doubt, but whether the jury, acting reasonably, could be convinced to that certitude by evidence it had a right to accept.”¹⁶ When ““there is conflicting testimony presented, it is for the jury to determine what weight and credibility to give to the testimony.””¹⁷ Circumstantial evidence is enough to support a conviction.¹⁸ The evidence “is to be considered in the light most favorable to the prosecution.”¹⁹ We have held that “[t]he testimony of the victim, if believed by the jury, would establish a sexual assault. Her testimony need not be corroborated in order for the conviction to stand.”²⁰

In the case at bar, the jury appeared to believe the children’s testimony in this case, and that is sufficient to affirm Esteban’s conviction. In addition, the medical exams that Suiter performed on both E.E. and

¹⁵Nika v. State, 113 Nev. 1424, 1434, 951 P.2d 1047, 1054 (1997), overruled on other grounds by Leslie v. Warden, 118 Nev. 773, 780 n.17, 59 P.3d 440, 445 n.17 (2002).

¹⁶Lisle v. State, 113 Nev. 679, 691, 941 P.2d 459, 467 (1997) (quoting Edwards v. State, 90 Nev. 255, 258-59, 524 P.2d 328, 331 (1974)).

¹⁷Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981) (quoting Stewart v. State, 94 Nev. 378, 379, 580 P.2d 473, 473 (1978) (quoting Hankins v. State, 91 Nev. 477, 477, 538 P.2d 167, 168 (1975))).

¹⁸Lisle, 113 Nev. at 691-92, 941 P.2d at 467.

¹⁹Furbay v. State, 116 Nev. 481, 486, 998 P.2d 553, 556 (2000).

²⁰Nordine v. State, 95 Nev. 425, 426, 596 P.2d 245, 246 (1979).

L.E. established that they had been victims of repeated sexual abuse. Accordingly, we conclude that the State produced sufficient evidence at trial to support Esteban's convictions.²¹

Therefore, we ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. Valorie Vega, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

²¹We have reviewed all of Esteban's additional arguments and conclude they are without merit.