IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN NEWBERG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41475

FILED

MAR 17 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction issued pursuant to a jury verdict. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

Appellant, Steven Newberg, appeals from a judgment of conviction, pursuant to a jury verdict, of one count of attempted sexual assault with a minor under the age of sixteen, two counts of use of a minor in producing pornography, six counts of sexual assault with a minor under the age of sixteen, three counts of open or gross lewdness, and one count of possession of visual presentation depicting sexual conduct of a person under the age of sixteen. Newberg was sentenced to: (1) a prison term of 96 months to 240 months for attempted sexual assault; (2) two concurrent terms of life, with eligibility for parole after 5 years for use of a minor in producing pornography, to run consecutive to (1); six concurrent life terms, with eligibility for parole after20 years, to run consecutive to (1) and (2); three concurrent terms of 12 months for open or gross lewdness to run concurrent to (1), (2) and (3); and a prison term of 28 months to 72 months for possession of visual presentation depicting sexual conduct of a person under the age of 16, to run concurrent with (1), (2), and (3) of the conviction. The district court also imposed a special sentence of lifetime supervision.



05-05221

On appeal, Newberg claims that the district court improperly: (1) denied him due process by refusing to excuse a juror who saw prejudicial material in violation of the district court's admonitions; (2) denied Newberg's motion for a psychological evaluation of Newberg's victim; and (3) denied Newberg's motion for an advisory verdict.

On Monday, January 27, 2003, the fifth day of Newberg's trial, the district court held a conference outside the presence of the jury, with the exception of Juror No. 10. The district court addressed Juror No. 10, indicating that she had expressed that she was troubled by something that had occurred over the weekend. The following dialogue transpired:

> JUROR NUMBER 10: On Friday night I walked into a room in my house where my husband had the television set on and I saw our courtroom.
>
> THE COURT: Uh-huh.
>
> JUROR NUMBER 10: He hit the mute button and I hadn't heard anything. Before he could hit the power button I saw words across the bottom of the screen and I thought the Court should know what I saw.
>
> THE COURT: And what were those words you saw?
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> JUROR NUMBER 10: Those words were two words, serial rapist.
>
> THE COURT: Okay. Did that give you an indication as to anything doing with this case? I mean it was this courtroom.
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> JUROR NUMBER 10: No, No.
>
> THE COURT: All right. You've seen those words. Do you have any type of problem of still being fair and impartial both to Mr. Newberg and to the State of Nevada on this matter?

> JUROR NUMBER 10: No, I see my job to look at the facts in this particular case without regard to, you know, anything that goes on around me.
>
> THE COURT: Are you comfortable still sitting in here? In other words, if you were Mr. Newberg or you were these prosecutors, would you want someone with your state of mind as it is today sitting on the jury, whether you be a prosecutor or defense attorney or the defendant himself?
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> . . . .
>
> JUROR NUMBER 10: My concern was, I did of course realize, that whether you know I thought this made a difference or not, that everyone needed to know that.
>
> THE COURT: You understand that that's the reason we give that admonishment—
>
> JUROR NUMBER 10: Right.
>
> THE COURT: - - so that if you do actually hear something, you brought it to Danny's attention, he brought it to my attention, now I brought it to the lawyers' attention.

The district court then inquired whether either side wanted to question Juror No. 10. Both parties declined. Newberg then requested that Juror No. 10 be excused and replaced with the one remaining alternate juror, on the basis that this episode was extremely prejudicial. The State argued against her replacement, noting that there was no difference between Juror No. 10 and the many other jurors who had heard and read similar things about Newberg's trial before becoming jurors. Furthermore, the State argued that Juror No. 10 indicated that she could be fair and, that if she had ulterior motives, she would not have come forward. The district court denied Newberg's challenge because it felt comfortable with Juror No. 10 and confident that she would limit her judgment to what occurred in the courtroom.

Newberg maintains that this error is clearly prejudicial and requires reversal of his convictions. We disagree. "Whether a defendant is prejudiced by juror misconduct is a fact question to be determined by the trial court, and its determination will not be disturbed on appeal in the absence of a showing of an abuse of discretion."[1] This court has noted that whenever there is a reasonable probability that juror misconduct affected the verdict, prejudice is shown.[2] Not all exposure to extrinsic information is automatically prejudicial; instead, this court will examine the nature of the information, analyzing it in the context of the trial as a whole, to determine if there is a reasonable probability that the information affected the verdict.[3] This court has instructed that to determine whether there is a reasonable likelihood that juror misconduct affected a verdict, the district court may consider numerous factors, including how and when the extrinsic evidence was introduced, the length of time it was discussed, and whether the evidence was material, cumulative, and admissible.[4] Furthermore, the district court "must determine whether the average, hypothetical juror would be influenced by the juror misconduct."[5]

In this case, the juror misconduct involved a brief exposure to extrinsic information, the words "serial rapist" on the bottom of a television screen, which occurred on the fifth day of trial, before the

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[1]Rowbottom v. State, 105 Nev. 472, 486, 779 P.2d 934, 942-43(1989).

[2]Meyer v. State, 119 Nev. 554, 564, 80 P. 3d 447, 455 (2003).

[3]Id. at 563-66, 80 P.3d at 456.

[4]Id. at 566, 80 P.3d at 456.

[5]Id.

beginning of deliberations. As soon as this incident was reported, the district court reminded Juror No. 10 of its admonitions, and it appeared clear that she understood not to discuss that episode with other jurors, lessening the likelihood that the evidence was introduced to other jurors. In fact, Juror No. 10 was not certain whether the words "serial rapist" referred to Newberg or whether they had anything to do with his case. In light of all of these circumstances, this court finds that an average hypothetical juror would not have been affected by this extraneous information, and there is little probability that Juror No. 10's exposure affected the jury's verdict. Therefore, Newberg has failed to demonstrate reversible prejudice, and the district court did not err in denying his request to replace Juror No. 10.

On December 23, 2002, Newberg submitted a motion, to which the State replied, requesting an independent psychological examination of his victim. Newberg alleged that there was no corroborating evidence to the sexual assault claim besides the victim's testimony because it was clear from the videotape that Newberg made of the incident that he was not physically forcing her into having sex. Additionally, Newberg asserts that a reasonable basis existed for believing that the victim's mental or emotional state may have affected her veracity because she had been treated by a psychologist and had exhibited suicidal behavior. On January 3, 2003, the district court held a hearing and denied the motion; however, the reason for the district court's denial is not evident from the record.

Initially, we note that the district court has the discretion "to grant or deny a defendant's request for a psychological examination of a child-victim" and absent an abuse of discretion, the court's decision will

not be set aside.[6] Notably, in the recent case of State v. Dist. Ct. (Romano), this court revisited the issue of what a defendant must show in order to be entitled to an independent psychological examination of an alleged sexual assault victim.[7] In that case, this court determined that the test previously applied under Koerschner v. State, did "not always adequately balance the needs of the victim and the defendant."[8] To achieve this goal, this court modified Koerschner and held that "a defendant is entitled to a psychological examination of an alleged sexual assault victim only where: (1) the State notices the defendant that it intends to examine the victim by its own expert, and (2) the defendant makes a prima facie showing of a compelling need for a psychological examination."[9]

To determine whether a compelling need exists, the trial court needs to consider the following: "(1) whether little or no corroboration of the offense exists beyond the victim's testimony, and (2) whether there is a reasonable basis 'for believing that the victim's mental or emotional state may have affected his or her veracity.'"[10] In addition, this court provided that trial courts must set forth a particularized factual finding stating the reasons why an examination is warranted.[11] Importantly, in Richmond v.

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[6]Chapman v. State, 117 Nev. 1, 4, 16 P.3d 432, 434 (2001).

[7]120 Nev. ___, ___, 97 P.3d 594, 600 (2004).

[8]Id.

[9]Id.

[10]Id. (citing Koerschner v. State, 116 Nev. 1111, 1116-17, 13 P.3d 451, 455 (2000)).

[11]Id. at ___, 97 P.3d at 600-601.

State, this court adopted the federal retroactivity rule, stating, "we will apply a new rule to all cases on direct appeal regardless of whether the new rule is based on the Federal Constitution or state law."[12] Therefore, this court will apply the newly adopted test enunciated in Romano to determine if Newberg was entitled to an independent psychological examination of the victim.

In the instant case, the district court properly denied Newberg's request for an examination. Importantly, as a threshold matter, the State did not rely on an expert in psychiatry or psychology in this case. In addition, Newberg failed to present a compelling reason for the examination. First, the evidence against Newberg was overwhelming. Not only did the victim testify to the specific acts of sexual assault committed by Newberg, but Newberg taped one such incident and that tape was played for the jury. Second, the mere fact that the victim had been seeing a psychiatrist and had exhibited self-destructive behavior did not provide, in and of itself, a reasonable basis for believing that her mental or emotional state may have affected her veracity. As a result, this court rejects Newberg's claims regarding his right to an independent psychological examination of the victim.

Finally, Newberg claims that the district court improperly denied his motion for an advisory verdict, which Newberg requested pursuant to NRS 175.381, on the last day of trial. In construing NRS 175.381, this court has said, "[t]he granting of an advisory instruction to

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[12]118 Nev. 924, 929, 59 P.3d 1249, 1252 (2002).

acquit rests within the sound discretion of the court."[13] At trial, Newberg contended that under Townsend v. State[14] the district court should give an advisory verdict that the jury consider only three counts of sexual assault of a minor under the age of 16. Newberg further requested a jury instruction on the matter, which the district court agreed to give to the jury. Newberg argued that the evidence depicted only three sexual acts: fellatio, sexual intercourse, and an additional act of fellatio. Newberg argued that the jury should not consider each distinct sexual act as a separate offense. Newberg contended it was improper to consider three additional separate charges of sexual assault, each instituted anew when Newberg was engaged in a single act of sexual conduct, stopped to adjust the recorder, and resumed the conduct.

In this case, the jury listened to the testimony of the witnesses and viewed the videotape Newberg made of the sexual assault. During closing argument the State explained in detail the factual basis for each specific count of sexual assault. The State explained why the duration of the breaks in the sexual conduct justified the imposition of separate counts. Then the jury, having received the instruction from Townsend,[15]

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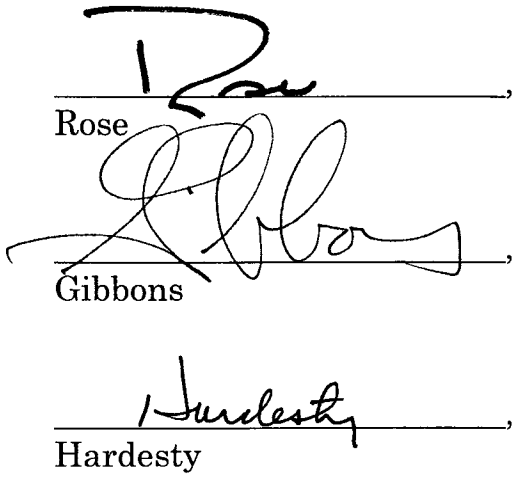
[13]Milton v. State, 111 Nev. 1487, 1493, 908 P.2d 684, 688 (1995) (quoting Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981)).

[14]103 Nev. 113, 734 P.2d 705 (1987).

[15]In Townsend, the defendant began lubricating the victim's vaginal area, stopped to put more lubricant on his finger, and then penetrated the child's vagina with his finger. Id. at 116, 734 P.2d at 707. Townsend was charged with two counts of sexual assault. Id. at 120, 735 P.2d at 710. This court overturned the conviction on one count observing that "Townsend's actions were continuous and did not stop between the different acts." Peck v. State, 116 Nev. 840, 848, 7 P.3d 470, 475 (2000).

which clearly informed the jury that a brief interruption of a sexual assault will not support two separate charges, weighed the evidence and found Newberg guilty on all counts. Based on the evidence before the jury, on the instruction from Townsend, and the discretionary nature of advisory verdicts, the district court did not abuse its discretion by refusing to issue an advisory verdict. We believe that the jury was entitled to determine, on its own, whether the evidence demonstrated the three additional counts of sexual assault alleged by the State.

Accordingly, we order the judgment of conviction AFFIRMED.



_____, J.
Rose

_____, J.
Gibbons

_____, J.
Hardesty

cc: Hon. Michael A. Cherry, 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