IN THE SUPREME COURT OF THE STATE OF NEVADA

SILVIO SOTO-PADRONE A/K/A SILVIO PADRON SOTO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41476

FILED

DEC 02 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 each of first-degree kidnapping of a minor with substantial bodily harm (count I), robbery (count II), sexual assault with substantial bodily harm (count IV), and battery with the intent to commit sexual assault (count V).[1] Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge. The district court sentenced appellant Silvio Soto-Padrone to serve a prison term of life with the possibility of parole after 15 years for count I, a concurrent prison term of 24-84 months for count II, a consecutive prison term of life with the possibility of parole after 15 years for count IV, and a concurrent prison term of life with the possibility of parole after 10 years for count V. The district court also ordered Soto-Padrone to pay $7,310.00 in restitution and imposed a special sentence of lifetime supervision to commence upon release from any term of probation, parole, or imprisonment.

First, Soto-Padrone contends that the district court committed constitutional error by denying his motion to suppress identification

[1]On count III, attempted murder, the jury could not reach a decision.

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evidence that was allegedly the product of an unduly suggestive one-on-one show-up. More specifically, Soto-Padrone argues that "[a] lone individual standing in handcuffs, with police officers flanking him, strongly suggested that Mr. Soto-Padrone was the alleged victim's assailant." Soto-Padrone also claims that the victim's identification was not reliable because two weeks had passed since the attack, she was frightened at the time and "had very little opportunity to view the suspect" prior to being rendered unconscious. We disagree with Soto-Padrone's contention.

This court has stated that the standard for out-of-court identifications is whether, upon review "of the totality of the circumstances, the identification 'was so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was denied due process of law.'"[2] Even if the identification procedure is found to be unnecessarily suggestive, however, "the key question is whether the identification was reliable."[3] The relevant factors for determining whether an identification is reliable include: "the witness' opportunity to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of [his] prior description of the criminal, the level of certainty

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[2]Bolin v. State, 114 Nev. 503, 522, 960 P.2d 784, 796 (1998) (quoting Stovall v. Denno, 388 U.S. 293, 302 (1967)), overruled on other grounds by Richmond v. State, 118 Nev. 924, 59 P.3d 1249 (2002).

[3]Gehrke v. State, 96 Nev. 581, 584, 613 P.2d 1028, 1030 (1980).

demonstrated at the confrontation, and the time between the crime and the confrontation."[4]

Based on our review of the record on appeal, we conclude that even if the out-of-court identification of Soto-Padrone was suggestive,[5] it was, nonetheless, reliable; and therefore, Soto-Padrone's due process rights were not violated. On the day of the crime, the victim accurately and consistently described Soto-Padrone with great detail. The victim's description of Soto-Padrone was so precise, in fact, that the arresting officer recognized Soto-Padrone when she found him based on the victim's description. As further proof of the reliability of the victim's identification, when shown a photo-array, and after attending a physical line-up with an individual fitting her description within days of the attack, the victim steadfastly rejected the possible suspect. At the challenged show-up, the victim positively and with certainty identified Soto-Padrone as her attacker. The victim also identified Soto-Padrone as her attacker at the preliminary hearing. The victim testified at trial that when Soto-Padrone pushed her to the ground and started choking her, his face was very close to hers. Therefore, based on the above, we conclude that the district court

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[4]Id.; Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

[5]But see Canada v. State, 104 Nev. 288, 294, 756 P.2d 552, 555 (1988) ("'[t]he use of handcuffs or other indicia of custody will not invalidate a show-up, at least where necessary for the prompt and orderly presentation of the suspect, consistent with protection of the officers and witnesses'") (quoting United States v. Kessler, 692 F.2d 584, 586 (9th Cir. 1982)).

did not err in denying Soto-Padrone's motion to suppress identification evidence.

Second, Soto-Padrone contends that the district court erred in admitting the testimony of Dr. Harold Zilberman regarding the percentage of child sexual assault cases in which there is a physical injury. Without objection or voir dire from Soto-Padrone, the State presented Dr. Zilberman as an expert witness in his field, pediatric emergency medicine, and the district court accepted him as an expert in child pediatrics. Soto-Padrone challenges the following exchange occurring on redirect examination of Dr. Zilberman:

> STATE: Now, you've conducted a lot of internal physical exams on young girls, haven't you?
>
> WITNESS: Yes.
>
> . . .
>
> STATE: How often in percentages do you find injuries to these young girls when sexual assault has been reported?
>
> DEFENSE COUNSEL: Objection, calls for speculation and relevance [sic].
>
> THE COURT: It's not speculation. He knows. You may answer the question.
>
> WITNESS: It is a very small minority of children do we find any kind of physical injury after there's been a sexual assault [sic].
>
> STATE: When you say small numbers, approximately how many, what percentage?
>
> WITNESS: Less than 5 percent.

And on recross examination:

> DEFENSE COUNSEL: In all of those cases you've done the evaluations in do you keep statistics . . . .

WITNESS: The statistics I gave you were not based on my cases.

DEFENSE COUNSEL: Do you keep statistics?

WITNESS: No, I do not.

. . .

WITNESS: The less than 5 percent I quoted to you were not based upon my examinations. They were based upon literature.

. . .

DEFENSE COUNSEL: What literature are you referring to?

WITNESS: Multiple literature in various textbooks on child sexual assault.

Citing to NRS 50.025,[6] Soto-Padrone argues that the district court committed prejudicial error in admitting the above testimony because Dr. Zilberman "was not testifying from personal knowledge" or giving an expert opinion, and instead, "was merely repeating something he had heard or read somewhere." We disagree with Soto-Padrone's contention.

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[6]NRS 50.025 states:

1. A witness may not testify to a matter unless:

(a) Evidence is introduced sufficient to support a finding that he has personal knowledge of the matter; or

(b) He states his opinion or inference as an expert.

2. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself.

"Whether expert testimony will be admitted, as well as whether a witness is qualified to be an expert, is within the district court's discretion, and this court will not disturb that decision absent a clear abuse of discretion."[7] A qualified expert's testimony may be admitted if the "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."[8]

In the instant case, we conclude that the district court did not abuse its discretion in admitting Dr. Zilberman's testimony. Dr. Zilberman's testimony was within his "specialized knowledge" as an expert in pediatric emergency medicine, and his reference to medical literature offered the trier of fact an explanation for the absence of any physical injury to the victim's genital area. Further, defense counsel had an opportunity to question Dr. Zilberman about the specific medical literature and attack its credibility.[9] Finally, Soto-Padrone's reliance on

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[7]Mulder v. State, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000).

[8]NRS 50.275; see also Townsend v. State, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987).

[9]NRS 50.305 provides:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

See also Singleton v. State, 90 Nev. 216, 219, 522 P.2d 1221, 1222-23 (1974) (holding that cross-examination casting doubt on source relied upon by expert was proper).

NRS 50.025 for support is misplaced. Dr. Zilberman was not offering an opinion regarding the percentage of child sexual assault cases resulting in physical injuries, but rather he was pointing out, what he called, "a fairly uniform consensus" culled from the medical literature.

Accordingly, having considered Soto-Padrone's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. Sally L. Loehrer, 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