IN THE SUPREME COURT OF THE STATE OF NEVADA

HAMID REZA HASHEMI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41695

FILED

FEB 14 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

This is an appeal from a judgment of conviction, pursuant to a jury verdict of six counts of sex related crimes involving two child victims, M.N and C.N. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

A jury convicted appellant Hamid Reza Hashemi of two counts of sexual assault on a child and four counts of lewdness with a child under age fourteen. The district court sentenced Hashemi to six life sentences with parole eligibility after fifty years. On appeal, Hashemi argues: (1) the State adduced insufficient evidence to sustain three of Hashemi's lewdness with a minor convictions; (2) the prosecutor committed prosecutorial misconduct during Hashemi's cross-examination; (3) the district court erred in providing the jury with a reasonable doubt jury instruction; and (4) the district court committed reversible error during the sentencing hearing. We agree with the first argument as it pertains to count six and reject the others.

FACTS

On February 24, 2000, the State charged appellant Hamid Reza Hashemi with six counts of sex related crimes. Counts one and two alleged that Hashemi committed sexual assault on a child, M.N. Counts three and four alleged he committed lewdness with a child under the age

of fourteen against M.N. Count five included an allegation that Hashemi committed sexual assault against C.N., and lewdness with a child under 14 against C.N. Count six alleged Hashemi committed lewdness with a child under 14 against C.N.

A jury trial commenced in May 2003, and the jury returned a guilty verdict on all six counts. As to count five, the jury determined that Hashemi was guilty of lewdness with C.N., rather than the sexual assault. Before the district court sentenced Hashemi, the State mentioned that Hashemi "lacks any remorse or empathy for what he did to those children." Hashemi maintained his innocence. The district court sentenced Hashemi to six life sentences with parole eligibility after fifty years.

During the trial, both child victims, M.N., age seven, and C.N., age five, testified regarding their sexual contact with Hashemi. In addition, Nicole Dhebenham, an employee at an emergency shelter for abused children, testified she had seen both young girls act out sexually to other kids at the shelter. Both of the girls' parents, Robert Neale and Donna Neale testified. Donna answered affirmatively when asked if the agreement with Hashemi to help around the house ultimately ended up with Hashemi babysitting the girls. Lily Clarkson, a forensic nurse examiner testified that she performs pediatric exams to rule out sexual abuse, and that she examined both M.N. and C.N. Clarkson testified in detail about her findings regarding both girls' injuries. Finally, Hashemi testified, denying any sexual contact with either girl, and maintaining his innocence.

## DISCUSSION

Sufficient evidence

Hashemi contends that there was insufficient evidence adduced at trial to sustain three of his lewdness with a minor convictions. We agree as to count six and overturn Hashemi's conviction on count six.

"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."[1] "[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."[2] "When there is conflicting testimony presented, it is for the jury to determine what weight and credibility to give to the testimony."[3] "Upon appellate review, all of the evidence is to be considered in the light most favorable to the prosecution."[4]

The jury found Hashemi guilty of count four, lewdness with a child under age fourteen. Count four alleged that Hashemi forced M.N. to touch his penis, "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child." At trial, M.N. denied that she touched Hashemi's penis. However, during trial a

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[1] Nika 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).

[2] Edwards v. State, 90 Nev. 255, 258-59, 524 P.2d 328, 331 (1974).

[3] Hankins v. State, 91 Nev. 477, 477, 538 P.2d 167, 168 (1975).

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

videotape of M.N's interview with Detective Michael Tone was played to the jury, in which M.N. stated that she touched Hashemi's penis. Furthermore, Tone testified at trial about the motion M.N. made during his interview with her when she described how she touched Hashemi's penis. We conclude that this is sufficient evidence to sustain Hashemi's lewdness with a minor conviction as alleged in count four.

The jury found Hashemi guilty of count five, lewdness with a child under age fourteen. Count five alleged that Hashemi touched C.N. "on her vagina, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child."

At trial, C.N. was called to testify, and when asked whether Hashemi touched her, answered "Yeah." She also said that Hashemi touched her on the "[t]he belly button" and "all over." When asked "[w]here were you when Ray[5] touched you all over your body," C.N. stated "[i]n the shower." C.N. testified that it made her feel bad when Ray touched her in the shower. She also stated that Hashemi "did bad stuff to me." However, C.N. never specifically stated exactly where Hashemi touched her.

Lily Clarkson, a forensic nurse examiner, testified that after performing an exam on C.N. her conclusion was that C.N.'s exam established "physical findings compatible with perineal trauma" and was "suggestive of abuse." Clarkson answered affirmatively when asked if her conclusion was consistent with the history C.N. had revealed to her. Clarkson testified C.N. told her Ray bathed her every day and he "spank[ed] my pe pe every day." Clarkson testified that at the time she

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[5]M.N. and C.N. referred to Hashemi as Ray.

examined C.N., the victim was "quite swollen and uncomfortable" and Clarkson could not see everything. Clarkson also testified she found "lots of eroded edema, a word for swelling." Clarkson stated she saw "[d]ivet injuries," which were fingernail marks at three different areas in C.N.'s vagina. Clarkson explained that to make that type of divet mark it would take "[s]omebody's finger applying quite a bit of force to that area." Clarkson further explained that these divet areas are a "half moon shape of a nail cutting through the skin. When it happened, there was bleeding and everything else." At the time Clarkson examined C.N., the divets were "fresh but no longer bleeding." Clarkson testified that C.N.'s hymenal tissue was also swollen. Clarkson answered affirmatively when asked whether, from what she could see, there had been some sort of penetration into the opening of C.N.'s vagina.

We conclude C.N.'s testimony coupled with Clarkson's examination of C.N. adduces sufficient evidence to sustain Hashemi's lewdness with a minor conviction as alleged in count five.

Finally, the jury found Hashemi guilty of count six, lewdness with a child under age fourteen. Count six alleged that Hashemi touched C.N.'s "genitals and/or nipples and/or breasts, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child." As stated above, C.N. never specifically stated that Hashemi touched her "genitals and/or nipples and/or breast."

There is sufficient evidence to support count five or alternatively count six, but not both counts, as there is insufficient evidence to establish the events underlying these counts were separate incidents. Therefore, we conclude there is insufficient evidence to sustain

Hashemi's lewdness with a minor conviction as alleged in count six and overturn his conviction on that charge.

Prosecutorial Misconduct

Hashemi contends that the prosecutor committed prosecutorial misconduct during Hashemi's cross-examination because the prosecutor continually attempted to get Hashemi to accuse the other witnesses of lying. We disagree.

During Hashemi's cross-examination, the prosecutor asked Hashemi if a number of witnesses were lying. Hashemi's counsel never objected to this line of questioning.

This court has long held that "as a general rule, 'the failure to make timely objections [to prosecutorial misconduct] and to seek corrective instructions during trial [precludes appellate consideration].'"[6] However, the court will consider "sua sponte plain error which affects the defendant's substantial rights, if the error either: '(1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings.'"[7] Finally, we have held that "[t]he level of misconduct necessary to reverse a conviction depends upon how strong and convincing

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[6] Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118 (2002) (quoting Pray v. State, 114 Nev. 455, 459, 959 P.2d 530, 532 (1998)).

[7]Rowland, 118 Nev. at 38, 39 P.3d at 118. (quoting Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993), vacated on other grounds, 516 U.S. 1037 (1996)).

... the evidence of guilt [is]."[8] "If the issue of guilt or innocence is close . . . prosecutor misconduct will probably be considered prejudicial."[9]

In Daniel v. State,[10] we adopted

> a rule prohibiting prosecutors from asking a defendant whether other witnesses have lied or from goading a defendant to accuse other witnesses of lying, except where the defendant during direct examination has directly challenged the truthfulness of those witnesses. Violations of the rule are subject to harmless-error review under NRS 178.598.[11]

The prosecutor committed prosecutorial misconduct by continually asking Hashemi whether the other witnesses were lying; however, we conclude that this error was harmless due to the substantial evidence adduced by the State that established Hashemi's guilt.

Reasonable doubt jury instruction

Hashemi contends that the district court violated his due process rights because the reasonable doubt instruction that the district court read to the jury impermissibly reduced the State's burden of proof. We disagree.

The jury instruction the district court read to the jury provides:

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[8] Oade v. State, 114 Nev. 619, 624, 960 P.2d 336, 339-40 (1998).

[9] Garner v. State, 78 Nev. 366, 374, 374 P.2d 525, 530 (1962).

[10] 119 Nev. 498, 78 P.3d 890 (2003).

[11] Daniel, 119 Nev. at 519, 78 P.3d at 904. NRS 178.598 provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

> A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable, must be actual, not mere possibility or speculation.[12]

Hashemi concedes this is the same jury instruction authorized by NRS 175.211(1).

In Middleton v. State,[13] we noted "This court would prefer that the legislature adopt a different definition which does not describe reasonable doubt as the kind that governs a person in life's 'more weighty affairs.'"[14] However, we noted that the court has no cause to declare the language unconstitutional, because "there [is] no reasonable likelihood that a jury applied this language unconstitutionally where the jury was also instructed concerning the presumption of innocence and the state's burden of proof."[15]

Here, the jury was instructed on the presumption of innocence and the State's burden of proof. Therefore, we conclude that the district

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[12]See NRS 175.211(1) (stating the same as the instruction issued by the district court in this case).

[13] 114 Nev. 1089, 968 P.2d 296 (1998).

[14] Middleton, 114 Nev. at 1111, 968 P.2d at 311 (1998) (quoting Bollinger v. State, 111 Nev. 1110, 1115 n.2, 901 P.2d 671, 674 n.2 (1995)).

[15] Middleton, 114 Nev. at 1111-12, 968 P.2d at 311.

court did not err in reading to the jury the instruction regarding the weighty affairs of life.

Sentencing hearing

Hashemi contends that the district court improperly considered the prosecutor's comment that Hashemi lacked remorse before sentencing him. We disagree.

Before the district court sentenced Hashemi, the prosecutor mentioned that Hashemi "lacks any remorse or empathy for what he did to those children." Hashemi maintained his innocence.

"A sentencing judge is allowed wide discretion in imposing a sentence; absent an abuse of discretion, the district court's determination will not be disturbed on appeal."[16] "[I]f the judge relies upon prejudicial matters, such reliance constitutes an abuse of discretion that necessitates a resentencing hearing before a different judge."[17] In Brake, we held "the district court's consideration of [the appellant's] 'lack of remorse' after he had maintained his innocence violated [the appellant's] Fifth Amendment rights and constituted an abuse of discretion."[18]

We conclude that Hashemi's argument is meritless. Furthermore, Brake is distinguishable from this case. In Brake, the district court specifically stated before sentencing the appellant, "[Y]our lack of remorse, your lack of insight into what you have actually done . . . .

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[16] Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993).

[17] Brake v. State, 113 Nev. 579, 584, 939 P.2d 1029, 1033 (1997) (quoting Castillo v. State, 110 Nev. 535, 545, 874 P.2d 1252, 1259 (1994).

[18] Brake, 113 Nev. at 585, 939 P.2d at 1033.

For that, your lack of remorse, this Court reaches the conclusion that the recommendation of the State is appropriate."[19]

Hashemi is merely speculating as to what the district court was thinking before sentencing him. The testimony at sentencing suggests that the district court considered the evidence adduced at trial before sentencing Hashemi. For example, before sentencing Hashemi, the district court stated: "I was present. I did hear the testimony. I saw the witnesses testify. I heard the defendant testify." Therefore, we conclude that the district court considered what was adduced at trial before sentencing Hashemi and not just what the prosecutor stated during the sentencing hearing.[20]

Therefore, we ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART.

_____, J.
Rose

_____, J.
Gibbons

_____, J.
Hardesty

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[19]Brake, 113 Nev. at 584, 939 P.2d at 1033.

[20]See Silks v. State 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976) (holding that "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence, this court will refrain from interfering with the sentence imposed.").

cc: Hon. Jerome Polaha, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk