IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL ALLEN DOTEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42373

FILED

APR 20 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon a jury verdict, for sexual assault with a minor under fourteen and lewdness with a minor under fourteen. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On appeal, appellant Michael Allen Doten argues that the district court abused its discretion by allowing B.E. and two State witnesses to testify as to statements B.E. made following the incident. Doten further argues that the State committed prosecutorial misconduct at trial.

In early 2002, Tara Virgin lived with her husband and five minor children (C.E., B.E., Z.V., S.V., and V.A.) in Las Vegas. B.E. was eight years old at the time. Margie Moreno lived downstairs from Tara and her family. Doten and Moreno were friends and attended the same church. Moreno introduced Doten to Tara and her family. Doten and Tara engaged in Bible study together. When Doten switched to a different church, he suggested that Tara's children attend activities there. Tara agreed so long as Doten provided transportation.

Doten would occasionally transport the children to the park or take them along while he ran errands. B.E. testified that Doten had taken her to his apartment on three occasions. On one of those occasions, Doten

took B.E. to his apartment to pick up a crock-pot he had borrowed from Moreno. While at his apartment, Doten told B.E. that he needed to fix his computer mouse. B.E. sat in a desk chair while Doten used his computer. B.E. testified that Doten then pulled up her shirt and gave her "slobber kisses" on her chest and stomach. B.E. testified at trial that she wanted him to stop, but said nothing because she was afraid. Doten continued to drive C.E. and B.E. to church activities after this incident.

On the Wednesday before Easter 2002, Doten drove B.E. to church. During the drive home, Doten told B.E. that they were "early" and that they should drive around the block. During this drive, Doten asked B.E. if she wanted to sit on his lap. B.E. testified that she said "yes," even though she did not want to sit on his lap, because she did not want to be rude. B.E. sat on Doten's lap with her hands on the steering wheel, pretending to drive. B.E. testified that Doten then reached his hand under her skirt and panties and "put one finger in my wrong spot." B.E. told Doten that he was hurting her, and he stopped.

Doten then dropped B.E. off at her house. B.E. and her siblings were all sleeping in the same bedroom that night because her grandparents were visiting. One of the children asked B.E. if she had had fun at church. She told them that Doten had touched her in her "wrong spot" and begged them not to tell their mother because B.E. was afraid she would get into trouble. That Saturday, Doten took B.E. and her siblings to church. After church, he took the children to a park to play. After returning from the park, B.E. and C.E. played with a bicycle outside their apartment building. C.E. wanted to take the bike to play with some friends. C.E. told B.E., "If you don't give me back my bike, I'm going to tell mom what happened."

Moreno's boyfriend, Joe, overheard C.E.'s statement. He told C.E. to tell him what had happened. When C.E. told Joe about Doten touching B.E., Joe ran back to the apartment and told Moreno. Moreno called B.E. into her apartment and asked her what had happened. B.E. told Moreno that Doten had put his finger "down there" after church on Wednesday. B.E. pointed to her vagina as she said this. Moreno then called Tara downstairs and told B.E. to tell her mother what had happened. B.E. repeated her story.

The next day, Tara called the church and told them what B.E. had said. The church then called the police. Catherine Flynn, a pediatric nurse practitioner in Las Vegas, performed a medical examination on B.E. The examination showed that B.E.'s hymen was intact and no evidence of sperm was found. Flynn testified that these results were consistent with digital penetration because digital penetration generally does not leave physical findings. On cross-examination, Flynn admitted that the findings may also indicate that no penetration had occurred.

Detective Don Cullison from the Las Vegas Metropolitan Police Department interviewed Doten about the allegations. During the course of the questioning, Doten stated that he "has a real soft spot in his heart for kids." Doten also stated that given his work with the church and his love for children, "I was expecting something like this, to be honest with you. But not from there." When asked whether he thought B.E. was making up the charges, Doten replied, "I'm not gonna . . . call her a liar." Nevertheless, Doten maintained that he had never touched B.E.'s vagina or done anything sexual with her. Doten continued to deny the charges

even after Detective Cullison took a swab of the inside of Doten's cheek and told him that they were going to check his DNA.[1]

During a two-day jury trial, the State presented nine witnesses and the defense presented three witnesses, including the defendant. The jury returned a guilty verdict on both counts. The district court sentenced Doten to concurrent sentences of life imprisonment with the possibility of parole after twenty years for Count 1 and life imprisonment with the possibility of parole after ten years for Count 2. Doten timely appealed the conviction.

## DISCUSSION

### The district court did not abuse its discretion by allowing three witnesses to testify as to B.E.'s prior consistent statements

#### NRS 51.385

Doten argues that the district court erred by allowing B.E. and two other State witnesses to recount B.E.'s statements describing the alleged sexual assault. Doten further argues that the admission was inconsistent with our interpretation of NRS 51.035 and NRS 51.385. We disagree.

NRS 51.385(1) allows for the admission of "a statement made by a child under the age of 10 years describing any act of sexual conduct performed with or on the child . . . in a criminal proceeding regarding that act of sexual conduct." Such statements are admissible if

> (a) The court finds, in a hearing out of the presence of the jury, that the time, content and

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[1]During cross-examination, Detective Cullison admitted that this was a "ruse" and that digital penetration does not leave DNA evidence that could be matched against Doten's swab.

circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; and

(b) The child testifies at the proceeding or is unavailable or unable to testify.[2]

In this case, the district court held a hearing outside the presence of the jury before Doten's trial began. The purpose of the hearing was to determine the admissibility of B.E.'s statements describing the alleged sexual assault.

The admissibility of such statements hinges on the district court's finding that the statements are trustworthy. Trustworthiness is determined by considering whether

(a) The statement was spontaneous;

(b) The child was subjected to repetitive questioning;

(c) The child had a motive to fabricate;

(d) The child used terminology unexpected of a child of similar age; and

(e) The child was in a stable mental state.[3]

The district court heard testimony from B.E., Moreno (B.E.'s neighbor), Tara (B.E.'s mother), and C.E. (B.E.'s brother). Doten had an opportunity to cross-examine all four witnesses. All four witnesses told the same story. Immediately following the incident, B.E. told her siblings that Doten had touched her in her "wrong spot." B.E. begged her siblings not to tell anyone because she was afraid that she would get in trouble. Three days later, C.E. threatened to "tell on" B.E. if she did not give him

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[2]NRS 51.385(1).

[3]NRS 51.385(2).

the bicycle. Moreno's boyfriend, Joe, overheard this statement and told C.E. to tell him what he was talking about. C.E. told Joe that Doten had touched B.E. in her "wrong spot," and Joe immediately informed Moreno. Moreno called B.E. into Moreno's apartment and asked her, privately, what had happened. B.E. told her that Doten had touched her "down there." Moreno then asked Tara to come downstairs, and B.E. told her story, once more, to her mother.

The district court concluded that B.E.'s statements had sufficient guarantees of truthfulness because she first made the statements immediately after the incident occurred. The district court also found that the statements were not fabricated in response to repetitive questioning by authority figures. B.E. first made the statement to her siblings and told adults only after Joe overheard her brother's threat.

The district court further noted that B.E. used the terms "private parts" or "wrong place" as opposed to "vagina" or "digital penetration." The court found this terminology to be further evidence that B.E.'s statements were her own and that her story was neither coached nor fabricated. Finally, the district court found that B.E.'s mental state was stable, although she was behind her class in reading. Based on this analysis, the district court admitted B.E.'s statements under NRS 51.385.

The State initially moved the district court to introduce B.E.'s statements through the testimony of five separate witnesses. The State argued that repetition and corroboration were necessary because the entire case rested on the child victim's testimony. The district court limited the State to two witnesses in addition to B.E. Doten objected, arguing that the corroborating witness testimony constituted prior

consistent statements and was therefore inadmissible hearsay. That objection was overruled. On appeal, Doten argues that the district court abused its discretion by allowing two State witnesses to testify as to the prior statements. We disagree.

"Trial courts have considerable discretion in determining the relevance and admissibility of evidence. An appellate court should not disturb the trial court's ruling absent a clear abuse of that discretion."[4] In this case, the district court allowed two State witnesses to testify as to what B.E. had told them following the alleged incident. Such testimony regarding out-of-court statements would ordinarily be inadmissible hearsay.[5] However, the testimony was not hearsay in this case. B.E. was subject to cross-examination, the corroboration was consistent with her own testimony, and the corroboration was offered to rebut an express attack of her credibility.[6]

The defense case centered on the allegation that B.E. had fabricated the story because she was mad at Doten for not allowing her to collect offerings at church. Doten argued that B.E. fabricated this story because she knew that her brother had been sexually abused and that people who abused children got in trouble. The defense essentially argued that B.E. fabricated the story to get revenge on Doten.

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[4]Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996) (citation omitted).

[5]"'Hearsay' means a statement offered in evidence to prove the truth of the matter asserted." NRS 51.035.

[6]NRS 51.035(2)(b).

We conclude that B.E.'s prior consistent statements were admissible under NRS 51.035(2)(b) to refute that charge. In addition, NRS 51.385(1) permits the district court to admit a trustworthy "statement made by a child under the age of 10 years describing any act of sexual conduct performed with or on the child." "Statement" is defined as "[a]n oral or written assertion."[7] NRS 51.385 does not limit which or how many witnesses may testify as to the statement. The only restriction is that the child must either testify or be unavailable or unable to testify.[8] We conclude that NRS 51.385 allows the district court, in its discretion, to determine how many witnesses will be allowed to testify regarding the "statement." In this case, the district court allowed the State to present two of its five proposed witnesses. In so doing, the district court balanced the State's need to corroborate the child-victim's testimony with Doten's right to avoid prejudicially cumulative evidence. The district court did not abuse its discretion.

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[7]NRS 51.045(1).

[8]NRS 51.385(1)(b). We note without decision that this subsection may not withstand constitutional scrutiny if the child is unavailable or unable to testify. The United States Supreme Court has recently held that the Confrontation Clause prohibits admission of "testimonial" hearsay unless the defense has had or will have an opportunity to cross-examine the declarant. Crawford v. Washington, 541 U.S. 36, 50-56 (2004). Though a future case may require us to determine the validity of statements admitted under NRS 51.385(1)(b), that issue is not presented here. B.E. was subject to cross-examination, and her statements were not "testimonial" because they were made to family members and acquaintances. Thus, the statements do not trigger the Crawford rule. Id.

Opening statement and closing argument

Doten argues that he is entitled to a new trial because the State referred to cumulative hearsay statements during its opening statement and closing argument. In response, the State argues that the statements were proper and that even if they were improper, Doten waived appellate review of the statements by failing to object. We agree.

In Gallego v. State, we reiterated that "[f]ailure to object during trial generally precludes appellate consideration of an issue."[9] Doten concedes that trial counsel did not object to the allegedly improper statements. Thus, Doten waived appellate review of this issue.

We recently held that reviewing only objected-to misconduct ensures the accuracy of our decisions in two ways.[10] First, such review restricts us, properly, to deciding actual controversies.[11] Second, judicial resources are conserved by encouraging trial counsel to take issue with inappropriate conduct at a time when the conduct can be corrected.[12]

Timely objections enable the district court to instruct the jury to disregard improper statements, thus remedying any potential for

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[9]117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

[10]Ringle v. Bruton, 120 Nev. 82, 94, 86 P.3d 1032, 1040 (2004).

[11]"'The failure to object to allegedly prejudicial remarks at the time an argument is made, and for a considerable time afterwards, strongly indicates that the party . . . did not consider the arguments objectionable at the time they were delivered, but made that claim as an afterthought.'" Id. at 95, 86 P.3d at 1040 (quoting Beccard v. Nevada National Bank, 99 Nev. 63, 65-66, 657 P.2d 1154, 1156 (1983)).

[12]Id. at 94-95, 86 P.3d at 1040.

prejudice.[13] Judicial economy requires that we encourage good trial practice, and granting new trials for error that could have been corrected with a simple objection by an alert attorney does not encourage good trial practice. Judicial economy militates against finding "prejudice" in a statement so banal as to warrant no objection below.

Nevertheless, we may still review plain error that "affects the defendant's substantial rights."[14] Plain error exists if the error "'had a prejudicial impact on the verdict when viewed in context of the trial as a whole.'"[15] Doten bears the burden to prove that the error was prejudicial in order to trigger this court's plain error review.[16] Doten merely asserts that the prosecutor's statements were error; there is no evidence that the error was prejudicial. Doten has failed to meet his burden, and we conclude that the error, if any, is harmless.

The prosecutor did not commit misconduct during her opening statement and closing argument

Doten next argues that he must be given a new trial because the prosecutor's opening statement referred to facts not in evidence. Specifically, Doten argues that the prosecutor's statement that "child molesters very rarely photograph or take photographs of what they're doing" was never proven. Doten further argues that the statement was improper because it implied prior bad acts to the jury. Doten's argument

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[13]Id. at 95, 86 P.2d at 1040.

[14]Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118 (2002).

[15]Id. (quoting Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993), vacated on other grounds, 516 U.S. 1037 (1996)).

[16]Gallego, 117 Nev. at 365, 23 P.3d at 239.

rests on the assertion that the statement suggested to the jury that Doten was a convicted child molester or that he somehow met "the standard profile of the usual 'child molester.'" Doten made no objection to these statements. Thus, Doten has waived appellate review under Gallego. Furthermore, the statements do not constitute plain error.

Doten argues that he must be given a new trial because the prosecutor's closing argument included personal opinion and facts not in evidence. Doten did object to one statement made by the prosecution during its rebuttal closing argument. The prosecution stated that Detective Cullison, who interrogated Doten, had never been able to "trick" anyone into falsely confessing and that police officers "do not get innocent people to confess." Doten objected, arguing that the statement alleged facts not in evidence. The district court overruled the objection. On appeal, Doten argues that a new trial is warranted because the statement improperly alleges facts not in evidence. We disagree.

"A prosecutor may not argue facts or inferences not supported by the evidence."[17] However, the evidence in this case supported the prosecutor's statement. During redirect examination, Detective Cullison testified that he had never, to his knowledge, tricked an innocent person into confessing. Accordingly, we conclude that the statement did not constitute prosecutorial misconduct.

Finally, Doten argues that the prosecutor impermissibly shifted the burden of proof during its rebuttal closing argument. During his closing argument, defense counsel indicated that B.E. had made an inconsistent statement to Detective Tharp of the Las Vegas Metropolitan

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[17]Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987).

Police Department. Detective Tharp retired to Illinois before trial began. Defense counsel stated that Detective Tharp "is now apparently counting chickens on her farm in Illinois and could not make the four-hour flight here so we could question her about [the inconsistent] statement."

In her rebuttal, the prosecutor stated that defense counsel had a copy of all interview transcripts and could have cross-examined B.E. about the allegedly inconsistent statements. The prosecutor also stated that defense counsel is "a good lawyer" who possessed "full subpoena powers" and could have ordered Detective Tharp to testify if there had been any inconsistency. On appeal, Doten argues that this statement impermissibly shifted the burden of proof by suggesting that he bore the burden to disprove the allegations against him. We disagree.

We have long followed the "invited error" doctrine. Under that doctrine, "'a party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit.'"[18] The doctrine applies whether the complaining party expressly or impliedly contributes to the error.[19] In this case, Doten expressly contributed to the complained-of error. Defense counsel's closing argument suggested that the State knew of relevant, conflicting evidence and was attempting to hide that evidence by not calling Detective Tharp as a witness. This statement invited the State to point out that defense counsel had a copy of the interview transcripts, full subpoena powers, and an opportunity to cross-examine B.E. about the allegedly inconsistent

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[18]Pearson v. Pearson, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) (quoting 5 Am. Jur. 2d Appeal and Error § 713, pp. 159-60 (1962)).

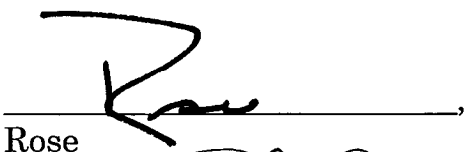
[19]Id.

statements. We conclude that the prosecutor's statements were permissible under the "invited error" doctrine.

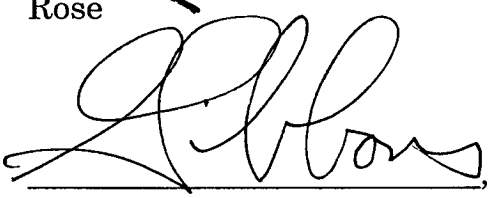
## CONCLUSION

We conclude that NRS 51.385 authorizes the district court, within its discretion, to allow corroborating testimony regarding a child-victim's prior statements. We further conclude that in this case, the testimony was admissible as evidence of prior consistent statements under NRS 51.035. We also conclude that Doten's failure to object below and the "invited error" doctrine bar appellate review of the prosecutor's allegedly prejudicial statements. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose



_____, J.
Gibbons

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Hardesty

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