

IN THE SUPREME COURT OF THE STATE OF NEVADA

PAUL FRANCIS LASBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44379

FILED

SEP 25 2007

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of 12 counts of lewdness with a minor under the age of fourteen, 3 counts of sexual assault of a child under the age of fourteen, and 1 count of attempted lewdness with a minor under the age of 14. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge. The district court sentenced appellant Paul Francis Lasby to serve 12 concurrent life prison terms with parole eligibility in 10 years for the lewdness counts, 3 concurrent life prison terms with parole eligibility in 20 years for the sexual assault counts, and 1 concurrent prison term of 24 to 96 months for the attempted lewdness count.

First, Lasby contends that his due process rights were violated because the information lacked adequate specificity. In particular, Lasby contends that the information alleged multiple counts for the same general act of sexual abuse on each victim and failed to include the specific day or month on which the acts of abuse occurred. While acknowledging that Cunningham v. State¹ holds that the State is not required to allege a specific date in charging the offenses of sexual assault and lewdness

¹100 Nev. 396, 400, 683 P.2d 500, 502 (1984).

involving a child, Lasby asks this court to revisit the issue and modify Cunningham. Lasby argues that he was prejudiced by the lack of specificity because the children were rarely alone with him, and the State's failure to allege the dates of the offenses limited his ability to present a defense based on alibi or improbability. We disagree.

In Cunningham, this court recognized that it is permissible for the State to allege a time frame for offenses involving sexual acts on a minor because time is not an element of the crimes, and child victims are often unable to remember more than the general period over which the abuse occurred.² In this case, the State alleged that the charged acts of lewdness and sexual assault occurred sometime during a four-year period, "on or between 1999, and May 14, 2003." During the alleged time frame, the three minor victims testified that they frequently visited Lasby, who was their step-grandfather and regular babysitter, and would sometimes stay the night. The victims also testified to multiple instances of molestation during the four-year period. Given the age of the victims and the nature of the charged crimes, we conclude that the information was sufficient to afford Lasby an opportunity to prepare a defense.

Second, in a footnote in his appellate brief, Lasby contends that the district court erred in giving the following jury instruction:

Where a child has been the victim of sexual assault or lewdness with [a] minor, and does not remember the exact date of the act, the State is not required to plead or prove a specific date but may plead and prove a time frame within which the act took place.

²Id. We decline Lasby's invitation to revisit our holding in Cunningham.

Lasby argues that "by emphasizing that the State doesn't have to show, really, ANY specific time frame, it creates a greater burden on the Defendant to show how the State's allegations are possibly uncorroborated and in fact contradicted by other witnesses, lack of physical evidence or impossibility." We conclude that the district court did not err by giving the jury instruction because it was a correct statement of Nevada law.³

Third, Lasby contends that the district court erred by denying his motion to sever the criminal charges as to each victim. Specifically, Lasby argues that the prejudice arising from the failure to sever the counts was compounded by the prejudice arising from the lack of specificity in the information, which required the defense witnesses to "testify in generalities." We disagree.

NRS 173.115(2) states that multiple offenses may be joined and charged together if the offenses are "[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan." "The test is whether joinder is so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the exercise of the court's discretion to sever."⁴ Moreover, "[i]f . . . evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be

³See *id.*

⁴*Honeycutt v. State*, 118 Nev. 660, 667, 56 P.3d 362, 367 (2002) (quoting *United States v. Brashier*, 548 F.2d 1315, 1323 (9th Cir. 1976)), overruled on other grounds by *Carter v. State*, 121 Nev. 759, 121 P.3d 592 (2005).

severed."⁵ "[J]oinder decisions are within the sound discretion of the trial court."⁶

We conclude that the district court did not abuse its discretion in denying Lasby's motion to sever the criminal counts. The sexual abuse was alleged to have occurred on three sisters during the same time period and under similar circumstances. The evidence of the sexual abuse of one victim would have been cross-admissible in the trials involving the other victims to establish motive.⁷ Accordingly, the counts were properly joined.

Fourth, Lasby contends that the district court erred in admitting prior bad act evidence. Specifically, Lasby contends that the district court failed to consider whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Lasby argues that the prejudicial nature of the evidence outweighed any potential probative value given that there was no other physical evidence or eyewitness testimony corroborating the victims' allegations. Lasby also argues that evidence that he had molested other family members and a close family friend should not have been admitted because it was not contemporaneously reported, the instances were remote in time, and lacked corroboration. We conclude that Lasby's contentions lack merit.

⁵Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989).

⁶Robins v. State, 106 Nev. 611, 619, 798 P.2d 558, 563 (1990); Shannon v. State, 105 Nev. 782, 786, 783 P.2d 942, 944 (1989).

⁷See Ledbetter v. State, 122 Nev. 252, 261-62, 129 P.3d 671, 679 (2006).

The record reveals that the district court conducted a Petrocelli hearing⁸ and considered the factors required by Tinch v. State.⁹ The prior bad act evidence showing that Lasby had committed similar sexual acts upon other young female family members and a close family friend was relevant to show motive.¹⁰ Additionally, any danger of unfair prejudice was alleviated when the district court gave the jurors a limiting instruction informing them that the evidence could not be considered to show criminal predisposition but only for the limited purposes allowable under NRS 48.045(2).¹¹ Accordingly, the district court did not abuse its discretion by admitting the evidence.

Fifth, Lasby argues that the district court erred by excluding any reference to allegations that another adult male, known as "Bone Bone," was accused of molesting the victims. Lasby argues that the exclusion of the evidence involving "Bone Bone" severely restricted his ability to present his theory of defense--"that the accusing minors were both knowledgeable about things sexual at an early age and in fact were complaining about conduct not at the hands of the Defendant but as a result of their interactions with Bone Bone." Additionally, Lasby alleges that the evidence that the State failed to investigate the sexual abuse charges against "Bone Bone" was relevant to his defense theory that the

⁸Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

⁹113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

¹⁰See Ledbetter, 122 Nev. at 261-62, 129 P.3d at 676; see also Rhymes v. State, 121 Nev. 17, 21, 107 P.3d 1278, 1281 (2005).

¹¹See Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001) (discussing the importance of a limiting instruction).

State's investigation of the allegations against Lasby was "ineffective" and "incomplete." We disagree.

In Summitt v. State, this court held that evidence of a six-year-old victim's prior sexual assault may be admissible for the limited purpose of counteracting the jury's perception that a child that age would not have the knowledge necessary to describe a sexual assault unless it had actually happened.¹² In determining whether evidence of prior sexual assaults should be admitted, the trial court must "balance the probative value of the evidence against its prejudicial effect."¹³ The focus should be on the "'potential prejudice to the truthfinding process itself,' i.e., 'whether the introduction of the victim's past sexual conduct may confuse the issues, mislead the jury, or cause the jury to decide the case on an improper or emotional basis.'"¹⁴

In this case, the trial court did not abuse its discretion in excluding reference to the prior sexual abuse allegations against "Bone Bone." Unlike in Summitt, the victims in this case were young adolescents at the time of trial and therefore their knowledge of sexual acts was not at issue.¹⁵ Further, the record indicates that "Bone Bone" lived in the Lasby house for only a brief time period during which the sexual assaults were alleged to have occurred. Additionally, "Bone Bone"

¹²101 Nev. 159, 163-64, 697 P.2d 1374, 1377 (1985).

¹³Id. at 163, 697 P.2d at 1377.

¹⁴Id. (quoting State v. Hudlow, 659 P.2d 514, 521 (Wash. 1983)).

¹⁵Cf. Johnson v. State, 113 Nev. 772, 776-77, 942 P.2d 167, 170-71 (1997) (evidence of prior sexual assault not admissible because the victim was an adolescent and therefore her lack of knowledge of sexual acts was not at issue).

could not be located to testify at trial, and the State's failure to investigate him had minimal relevance to whether the State's investigation against Lasby was complete. Accordingly, the district court did not abuse its discretion by refusing to admit evidence of alleged sexual abuse perpetrated by "Bone Bone."

Sixth, Lasby contends that the district court erred by refusing his request for independent psychological examinations of the victims. Lasby argues that the examining nurse, social worker, and family members who described the victims' emotional demeanors "essentially vouch[ed] for their veracity through these psychological states which the defendant had an absolute right to counter with his own witnesses who could interview the accusing minors."¹⁶ We conclude that Lasby's contentions lack merit.

The overriding consideration in determining whether to permit a psychological examination is whether there is a compelling reason warranting such an examination.¹⁷ In resolving this question, the district court must weigh the following factors: (1) whether the State benefits from a psychological or psychiatric expert; (2) whether there is corroborating evidence beyond the testimony of the victim; and (3) whether there is a reasonable basis for believing that the victim's mental

¹⁶We reject Lasby's contention that the witness testimony describing the emotional demeanors of the victims was improper because it amounted to impermissible witness vouching for the truthfulness of the victims. Cf. Felix v. State, 109 Nev. 151, 849 P.2d 270 (1993), overruled on other grounds by Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001).

¹⁷Koerschner v. State, 116 Nev. 1111, 1116-17, 145, 13 P.3d 451, 455 (2000).

or emotional state affected the victim's veracity.¹⁸ The district court's ruling denying a request for a psychological examination of the victim will not be reversed absent an abuse of discretion.¹⁹

In this case, the district court did not abuse its discretion by denying Lasby's request for independent psychological evaluations of the victims. Even assuming the State presented expert testimony, Lasby failed to establish a reasonable basis for questioning the victims' veracity. Lasby did not allege that the victims had previously made prior false allegations of sexual abuse or engaged in inappropriate sexual behavior.²⁰ Lasby's allegations in the pretrial motion for a psychological examination that the victims were a "product of a broken home and a highly dysfunctional home" and that the victims' father engaged in drug trafficking provided an insufficient basis for questioning the victims' veracity. Accordingly, the district court did not abuse its discretion by denying Lasby's request.

Seventh, Lasby argues that the district court erred by failing to conduct a meaningful competency examination of the child victims. Specifically, Lasby argues that "the trial court embarked upon a very light hearted and ineffective canvassing and came to the conclusory finding that [the victims] were competent seemingly because they knew that a bunny

¹⁸Id.

¹⁹Abbott v. State, 122 Nev. 715, 723, 138 P.3d 462, 467 (2006).

²⁰Cf. id. at 731, 138 P.3d at 473 (fact that four-year-old victim made "prior unsubstantiated allegations, engaged in sexual behavior, and had been exposed to sexual activities" was reasonable basis to question her veracity); Marvelle v. State, 114 Nev. 921, 928-31, 966 P.2d 151, 156-57 (1998), abrogated in part on other grounds by Koerschner, 116 Nev. 1111, 13 P.3d 451.

was not a bear in a picture." We conclude that Lasby's contentions lack merit.

This court will not disturb a finding of competency to testify absent a clear abuse of discretion.²¹ A child's testimony supports a finding of competency if "she is able to receive just impressions and relate them truthfully."²² Courts must evaluate a child's competency on a case-by-case basis, but relevant considerations include:

(1) the child's ability to receive and communicate information; (2) the spontaneity of the child's statements; (3) indications of "coaching" and "rehearsing;" (4) the child's ability to remember; (5) the child's ability to distinguish between truth and falsehood; and (6) the likelihood that the child will give inherently improbable or incoherent testimony.²³

In this case, after conducting an in camera hearing, the district court found that the victims were competent to testify. The district court's finding is supported by substantial evidence. In particular, the victims were able to distinguish between truth and falsehood, and there was nothing in the record indicating that they had been "coached" or were unable to communicate. Accordingly, the district court did not abuse its discretion in finding that the victims were competent.

Eighth, Lasby contends that the prosecutor committed misconduct by "injecting herself as a witness in the proceedings" in her examination of a State's witness, Amber Lasby. At trial, the prosecutor twice asked Amber, "didn't you tell me that [the victims] had told you that

²¹Lanoue v. State, 99 Nev. 305, 307, 661 P.2d 874, 874 (1983).

²²Evans, 117 Nev. at 624, 28 P.3d at 509.

²³Id. (quoting Felix, 109 Nev. at 173, 849 P.2d at 235).

your dad was touching them." (Emphasis added.) Lasby argues that, in examining Amber, the prosecutor "personally vouch[ed] for herself as the source of truth" and effectively characterized Amber as a liar. Citing to Tomlin v. State,²⁴ Lasby further argues that the prosecutor should have withdrawn from the case because she was a necessary witness. We disagree.

Preliminarily, we note that Tomlin is inapposite because it involved a trial where the prosecutor took the stand, gave sworn witness testimony, and then continued with the prosecution of the case.²⁵ Here, the prosecutor did not testify at the trial, but instead used a prior inconsistent statement to impeach a State's witness. This court has recognized that it is permissible for a prosecutor to use a prior inconsistent statement to attack the credibility of a State's witness.²⁶ However, this court has further recognized that it is not permissible for a prosecutor to inject her personal beliefs or opinions into the proceedings.²⁷ Even assuming without deciding that the prosecutor acted improperly in her

²⁴81 Nev. 620, 407 P.2d 1020 (1965).

²⁵Id. at 623, 407 P.2d at 1021-22.

²⁶NRS 50.075.

²⁷Flanagan v. State, 104 Nev. 105, 109, 754 P.2d 836, 838 (1988) ("By stepping out of the prosecutor's role, . . . and by invoking the authority of . . . her own supposedly greater experience and knowledge, a prosecutor invites undue jury reliance on the conclusions personally endorsed by the prosecuting attorney.") (internal quotation and citation omitted).

examination of Amber, we conclude that the alleged misconduct did not rise to the level that would justify overturning Lasby's conviction.²⁸

Ninth, Lasby argues that the district court erred in denying his motion for a mistrial based on prosecutorial misconduct and jury tampering. Specifically, Lasby contends the prosecutor attempted to influence the vote of a hold-out juror, juror number nine, by threatening a perjury charge "within earshot of a deliberating juror." Citing to Meyer v. State,²⁹ Lasby argues that the district court erred in questioning the deliberating jurors about conversations they had with juror nine and in allowing juror nine to resume deliberating without inquiring whether he overheard the prosecutor's threats of perjury. We conclude that Lasby's contentions lack merit.

The district court did not abuse its discretion in denying the motion for mistrial based on an allegation of jury tampering. At Lasby's trial, the district court individually questioned each juror in order to investigate an allegation that juror nine told other jurors, before deliberations began, that he had reached a decision on the issue of guilt. The district court did not delve into the thought processes of the jurors and, therefore, the procedure employed by the trial court in questioning the jurors to determine whether juror nine had engaged in misconduct before deliberations was permissible.³⁰ We likewise conclude that the

²⁸See Greene v. State, 113 Nev. 157, 169, 931 P.2d 54, 62 (1997) ("The relevant inquiry is whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process."), modified on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

²⁹119 Nev. 554, 80 P.3d 447 (2003).

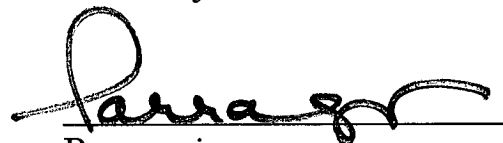
³⁰Id. at 565, 80 P.3d at 456.

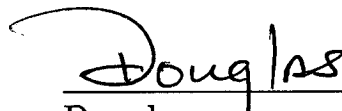
district court did not err in concluding that juror nine did not hear the prosecutor's comment about perjury made at a bench conference without conducting additional inquiry.³¹

Having considered Lasby's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.³²


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

³¹See People v. Cleveland, 21 P.3d 1225, 1231 (Cal. 2001) (the decision to investigate an allegation of juror bias rests with the sound discretion of the trial court).

³²We note that there is a clerical error in the judgment of conviction. The judgment incorrectly states that Lasby was convicted pursuant to a guilty plea. In fact, Lasby was convicted pursuant to a jury verdict. Following this court's issuance of its remittitur, the district court shall correct this error in the judgment of conviction. See NRS 176.565 (providing that clerical error in judgments may be corrected at any time); Buffington v. State, 110 Nev. 124, 126, 868 P.2d 643, 644 (1994) (explaining that district court does not regain jurisdiction following an appeal until supreme court issues its remittitur).

cc: Eighth Judicial District Court Dept. 16, District Judge
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