IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL E. MURPHY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44914

FILED

MAY 10 2006

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 three counts of lewdness with a minor under the age of 14 years. Third Judicial District Court, Lyon County; Archie E. Blake, Judge. Appellant Michael E. Murphy contends on appeal that the district court committed reversible error in relation to the trial testimony of a marriage and family therapist.

The basic facts are the following. Murphy moved in with Cynthia B. and her three children in 2002, when Cynthia's older daughter, L., was eight years old. L. testified that sometime after that Murphy began to touch her inappropriately when her mother was away. She said that on one occasion he touched her "private parts" under her clothes and had her smell his fingers. She told her mother about the touching one time, and Cynthia talked with Murphy. But after the talk, Murphy threatened to touch L. in front of her mother if she ever told again. L. was frightened, and the sexual abuse continued. She testified to another incident in which Murphy took her hands, put them down his pants, and made her touch his "private part."

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In May 2003, L.'s seven-year-old cousin, D., spent two nights at Cynthia's home. L. and D. testified that while Cynthia was away on the second night, Murphy French-kissed both of them. D. testified that Murphy later put his hand partway under her panties and touched her "bladder," above her "private parts." When D.'s mother picked her up the next day, D. was upset and told her about Murphy's actions. When first questioned after this incident, L. denied that Murphy had done anything to her or D., but she later disclosed Murphy's abuse to an aunt and to authorities.

Murphy contends that the district court erred in two ways in regard to the testimony of Kathleen Milbeck, a marriage and family therapist. He argues first that the court erred in referring to Milbeck as an "expert." After Milbeck testified regarding her qualifications, the following exchange occurred:

> Prosecutor: Your honor, I would ask Ms. Milbeck be recognized as an expert in the subject of sexually abused treatise, [sic] their diagnosis, treatment and instruction of law enforcement in investigative techniques.
>
> Defense Counsel: Absolutely inappropriate for this court to acknowledge that this witness is an expert witness. That is an appropriate determination for the jury.
>
> District Court: She's been qualified as an expert.

Milbeck went on to testify that the behavior and disclosures of the victims were consistent with those of children who had been sexually abused. Later, Murphy used Milbeck as his own expert witness in inquiring as to possible personality disorders suffered by the parents of the victims.

Murphy's trial objection to acknowledging Milbeck as an expert was partly sound and partly incorrect. The basis he gave for objecting was incorrect: the jury does not determine whether a witness is qualified to testify as an expert; the district court does.[1] The jury then determines the weight and credibility that such testimony deserves.[2] But Murphy is correct that the district court should not have deemed Milbeck an expert in front of the jury. As this court has explained:

> In ruling on whether or not a witness may testify as an expert, the court must take care not to use terms such as "qualified as an expert" or "certified as an expert" when referring to the witness in the presence of the jury. The court should simply state that "the witness may testify," or sustain any objection to a request to permit the witness to testify as an expert. This will prevent potential prejudice by either demeaning or promoting the credibility of the witness.[3]

Murphy claims that the error "resulted in extreme prejudice as a matter of law, particularly when this case had no evidence corroborating the allegations made by the alleged victims, nor any physical evidence supporting the allegations." We disagree.

First, the evidence against Murphy, even if primarily the testimony of the two child victims, was strong. Second, Murphy himself used Milbeck as an expert. Finally, the jurors were properly instructed

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

[2]Id.

[3]Id. at 13 n.2, 992 P.2d at 852 n.2.

that they were "not bound" by an expert opinion and were to "[g]ive it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound." They were also instructed: "In admitting evidence to which an objection is made, the Court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness." The district judge further instructed them:

> I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are, or are not, worthy of belief; what facts are, or are not, established; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any these matters, I instruct you to disregard it.

We conclude that no prejudice resulted from the district court's reference to Milbeck as an expert.

Murphy's second assignment of error is that the district court improperly refused his request to inspect the notes of L.'s mental health therapist, which were part of Milbeck's file for this case. Because Milbeck reviewed the file in preparation for her testimony, Murphy contends that he had a right to the therapy notes under NRS 50.125(1), which provides that an adverse party is entitled to inspect a writing used by a witness to refresh her memory.[4] He also contends that the district court compounded

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[4]NRS 50.125(1) provides:

> If a witness uses a writing to refresh his memory, either before or while testifying, an adverse party is entitled:

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the error by failing to preserve the notes pursuant to NRS 50.125(2).[5]

In response to Murphy's request to inspect the therapy notes, the prosecutor and Milbeck expressed concern that the notes were confidential because they were prepared in L.'s treatment by a third party. (On appeal, the State has not argued or provided any authority that confidentiality prevented the notes' disclosure to the defense.) Also, Murphy acknowledged that he had been provided with a pretrial report by Milbeck that summarized the notes. The district court then examined the notes in camera and ruled that Murphy's request was not timely because there had been ample time for discovery. Even so, the court allowed Murphy "to look at the intake diagnostic summary . . . and the basic final related to the diagnosis" for L. The district judge further stated: "I went

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. . . *continued*

> (a) To have it produced at the hearing;
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> (b) To inspect it;
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> (c) To cross-examine the witness thereon; and
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> (d) To introduce in evidence those portions which relate to the testimony of the witness for the purpose of affecting his credibility.

[5]NRS 50.125(2) provides:

> If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in chambers, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal.

through all of the other pages of the report given to Ms. Milbeck from the therapist. I find that the great majority, almost all of it has [to] do with individual therapy sessions. The court has reviewed those, finds that . . . they are not relevant in this proceeding."

Murphy maintains that he was denied the opportunity to effectively cross-examine Milbeck on the therapy notes and that extreme prejudice resulted because Milbeck never interviewed the victims but based her opinion upon the withheld notes. Despite errors by the district court, however, the record does not support this argument.

The district court erred in finding Murphy's request untimely. His request was not for discovery but for a writing used to refresh a witness's memory; it was therefore timely under NRS 50.125(1). Under NRS 50.125(2), the district court properly examined the notes in chambers, excised portions that it considered irrelevant, and provided the remainder to Murphy. But it erred under that same provision in failing to preserve for this court's review the notes that were withheld over Murphy's objection. We conclude that these errors were harmless.

As the State points out, none of Milbeck's direct-examination testimony referred to the therapy notes, and during cross-examination Murphy did not ask any questions about the notes, even though he had been allowed to examine part of them. And Milbeck relied on much more than the therapy notes; she based her opinion on videotaped and audiotaped interviews of the victims by detectives, her own interviews of the victims' mothers and an aunt, police reports and witness statements, and the preliminary hearing transcript. Therefore, even assuming that

Murphy should have been allowed to inspect the notes, we conclude that no prejudice resulted.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Hon. Archie E. Blake, District Judge
Jack Marshall Fox
Attorney General George Chanos/Carson City
Lyon County District Attorney
Lyon County Clerk