IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNY JOE MORPHEW,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48196

FILED

OCT 17 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of possession of a controlled substance and one count of the unlawful use of a minor in a sexual portrayal. Fifth Judicial District Court, Nye County; Noel E. Manoukian, Senior Judge. The district court sentenced appellant Denny Joe Morphew to a prison term of 12 to 48 months for possession of a controlled substance, and to a prison term of life with parole eligibility after 5 years for the use of a minor in a sexual portrayal.

Morphew first contends that the district court erred by allowing testimony from unendorsed witnesses. The original information was filed in this case on July 26, 2005. An amended information was filed on October 25, 2005, and another information was filed on March 16, 2006, after the appointment of a special prosecutor. The original information and the first amended information both included the names of all the potential witnesses of which the State was aware. The final information that was filed, however, inexplicably listed only one witness, a detective.

Prior to the start of trial, Morphew moved to dismiss the case based on the State's failure to endorse the names of the additional witnesses. The district court found that although the State should have

listed the witnesses on the final charging document, Morphew had failed to demonstrate any prejudice. "Nevada case law establishes that failure to endorse a witness constitutes reversible error only where the defendant has been prejudiced by the omission."[1] Morphew's argument is therefore without merit.

Morphew next contends that the district court should have dismissed the prosecution for lack of jurisdiction. Specifically, Morphew argues that the special prosecutor had no authority to prosecute him because she signed her oath of office on March 1, 2006, but neglected to record the oath until April 18, 2006.

Morphew relies on NRS 252.070(3), which provides that the oath of office of a deputy district attorney must be recorded in the office of the county recorder. The statute further provides that: "From the time of the recording of the appointments . . . persons shall be deemed to have notice of the appointments." We do not read the statute to mean that the oath has no effect until it is recorded. Rather, once the appointment and oath are recorded, individuals are precluded from claiming that they had no notice of the appointment.

In this case, the record supports the district court's finding that defense counsel had actual notice of the special prosecutor's appointment, by virtue of communication with her and her appearance at the preliminary hearing, prior to the recordation of the oath. We therefore conclude that the district court did not err by denying the motion to dismiss.

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[1]Jones v. State, 113 Nev. 454, 473, 937 P.2d 55, 67 (1997).

Morphew also contends that the jury was improperly instructed. Specifically, Morphew argues that the jury should have been instructed to consider the standard enunciated in Miller v. California,[2] which Morphew argues is more beneficial to the defense rather than the standard in New York v. Ferber.[3]

Miller requires that in order to be deemed obscene, a work taken as a whole, must appeal to the prurient interest, must depict or describe sexual conduct in a patently offensive way, and also must lack serious literary, artistic, political or scientific value.[4] In Ferber, however, the United States Supreme Court held that pornography showing minors can be proscribed whether or not the images are obscene pursuant to the definition set out in Miller.[5]

NRS 200.700(4) defines sexual portrayal as "the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value." The statute therefore incorporates two of the Miller factors. In this case, the jury was instructed with the statutory definition of sexual portrayal, and it was also given an instruction containing various factors to consider in determining whether a photograph constitutes a sexual portrayal. We conclude that the jury was adequately instructed, and we reject Morphew's argument that Nevada's statutory scheme regulating child

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[2]413 U.S. 15 (1973).

[3]458 U.S. 747 (1982).

[4]Miller, 413 U.S. at 24.

[5]Ferber, 458 U.S. at 764.

pornography requires a finding of obscenity pursuant to all of the factors set forth in Miller.

Morphew further contends that NRS 200.710(2) is unconstitutionally vague. Due process does not require impossible standards of specificity in statutory language, especially when, if viewed in the context of the entire statutory provision, there are well settled meanings for the words used.[6] The term "sexual portrayal" in NRS 200.710 is not unconstitutionally vague when examined in light of the specific definition provided under NRS 200.700(4): a "depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value." Moreover, the statute provides a specific standard by which police can judge whether a photograph is a "sexual portrayal" and thus does not leave absolute discretion in the hands of the police or encourage arbitrary enforcement. Accordingly, we conclude that NRS 200.710 is not unconstitutionally vague.

Finally, Morphew argues that he is entitled to have 6 additional days of pre-sentence credit applied to his sentence for use of a minor in a sexual portrayal. Although the State does not object to applying the additional credit, it is not entirely clear whether Morphew is actually entitled to the time. In particular, we note that at the time of sentencing, the district judge was aware that the 370 days credit awarded exceeded the sentence for possession of a controlled substance, yet he

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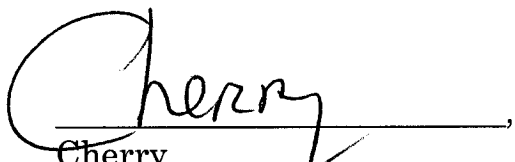
[6]Woofter v. O'Donnell, 91 Nev. 756, 762, 542 P.2d 1396, 1400 (1975) (citing United States v. Brown, 333 U.S. 18, 25-26 (1948); United States v. Sullivan, 332 U.S. 689, 693-94 (1947)).

elected to award the credit as to that count anyway. We conclude that this matter should be remanded for a determination as to what credit should be granted.

Based on the foregoing, we

ORDER the judgment of conviction AFFIRMED IN PART AND REMANDED IN PART.

_____, J.
Gibbons



_____, J.
Cherry

_____, J.
Saitta

cc: Chief Judge, Fifth Judicial District
Hon. Noel E. Manoukian, Senior Judge
Earnest, Gibson & Kuehn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Nye County District Attorney/Tonopah
Nye County Clerk