IN THE SUPREME COURT OF THE STATE OF NEVADA

DEMETRIOUS STEWART,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48738

FILED

MAR 31 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of 11 counts of sexual assault with a minor under 14 years of age and 3 counts of lewdness with a minor under 14 years of age. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.[1]

This case stems from appellant Demetrius Stewart's molestation of his stepdaughter, C.T. On appeal, Stewart challenges the judgment of conviction, arguing that (1) the district court abused its discretion when it prohibited the defense counsel from introducing impeachment evidence from C.T.'s MySpace webpage, (2) the prosecutor improperly appealed to the jurors' sympathy during closing arguments, (3) Jury Instruction No. 8 was improper, and (4) the district court vindictively punished Stewart for exercising his right to a jury trial.

We conclude that each of Stewart's challenges fails for the following reasons: (1) the Myspace evidence does not suggest any knowledge of sexual conduct before the molestation started; (2) the prosecutor's argument was not improper because it went to an element of the crime of sexual assault with a minor under 14 years of age; (3) we have previously rejected similar challenges to Jury Instruction No. 8; and (4)

[1]The Honorable Nancy M. Saitta, Justice, did not participate in the decision of this matter.

the sentences were within the statutory guidelines and supported by evidence. Therefore, we affirm the district court's judgment of conviction.

FACTS AND PROCEDURAL HISTORY

Stewart married C.T.'s mother, Melanie, when C.T. was about 10 years old. C.T. referred to Stewart as "dad," but he was not her biological father. When C.T. was about 12 years old, she and her family moved from South Carolina to Las Vegas. After the move, C.T. claimed that Stewart repeatedly molested her. C.T. told Melanie about the molesting after Melanie and Stewart separated because of other issues. Melanie did not believe C.T., but she forced Stewart out of the family home for other reasons. About a month later, Stewart denied the contact and moved back into the home.

Before Stewart first left the home, C.T. claimed he would molest her about four to five times a week. According to C.T., she tried to lock her door, but Stewart would keep knocking and scaring her until she let him in her bedroom. When C.T. realized she could not stop Stewart, she bargained with him to limit the contact to three times a week.

Eventually, Melanie started divorce proceedings for separate issues. At this time, C.T. told Melanie that the molesting had continued, but again Melanie did not believe her. As a result, C.T. convinced Melanie to get a tape recorder and C.T. recorded a conversation with Stewart about the molesting. C.T. played the conversation for Melanie, who took C.T. to the police station the next day.

Following Melanie's statements, the State charged Stewart with 12 counts of sexual assault with a minor under 14 years of age, 14 counts of lewdness with a minor under 14 years of age, and 1 count of sexual assault. After a five-day trial, the jury convicted Stewart of 11 counts of sexual assault with a minor under 14 years of age and 3 counts

of lewdness with a minor under 14 years of age. Regarding the sexual assault charges, Stewart received 11 life sentences with a possibility of parole after 20 years. Counts 1, 3, 5, 7, 9, and 10 were to run concurrent with each other, while Counts 12, 14, and 16 were to run concurrent with each other and consecutive to Counts 1, 3, 5, 7, 9, and 10. Counts 18 and 20 were to run consecutive to Counts 1, 3, 5, 7, 9, and 10.

For each of the three lewdness charges, Stewart received sentences of 20 years with a minimum parole eligibility of 2 years. Counts 24, 25, and 26 were to run concurrent with each other and consecutive to all other counts. Stewart received 613 days credit for time served.

DISCUSSION

The district court did not abuse its discretion when it held C.T.'s MySpace webpage evidence was irrelevant

Stewart argues that C.T. presented herself at trial as a young girl uncomfortable with discussing sexual matters. But according to Stewart, C.T. had previously used sexually explicit language while communicating on MySpace with her mother, Melanie. Stewart argues that the district court's denial of the MySpace evidence was error because the evidence was proper impeachment material, which the jury could have used in evaluating C.T.'s credibility. We disagree because the evidence does not suggest any knowledge of sexual conduct before the molesting started.

"'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.'" Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004) (quoting Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996), overruled on other grounds by McConnell v. State, 120 Nev. 1043, 1069, 102 P.3d 606, 624 (2004)). When determining whether evidence is relevant, the district

court must consider NRS 48.015, which defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."

Stewart sought to introduce a statement made by C.T. on her MySpace webpage to Melanie. The statement said something regarding "bust[ing] her [Melanie's] comment cherry." The district court prohibited the evidence because it did not suggest "any prior knowledge of a sexual conduct, sexual discussions [sic]" and it was potentially impermissible character evidence. In addition, a party can only introduce specific-instance evidence on cross-examination, "subject to the general limitations upon relevant evidence." NRS 50.085(3) (emphasis added). Thus, a district court can properly prohibit evidence that is unrelated to the witness' trial demeanor. See Sterling v. State, 108 Nev. 391, 395, 834 P.2d 400, 402-03 (1992) (holding that the district court did not abuse its discretion when it found evidence of a victim's daily routine, which was offered to show that victim was fabricating the allegations, was irrelevant).

We conclude that the district court did not abuse its discretion when it prohibited the statement. C.T. made the statement after the alleged acts occurred, and the sexual overtone in the statement does not rise to the same level of sexual content elicited in C.T.'s trial testimony. Further, C.T. made the statement to Melanie, a person she trusted, in a different context than discussing her own molestation in a public courtroom.

The prosecutor did not improperly appeal to the jurors' sympathy during closing argument

The prosecutor, in her closing argument, repeatedly referred to the trust that Stewart, as a father, violated. The prosecutor referenced

various childhood milestones, such as walking, toilet training, bedtime routines, and school, to illustrate the severity of Stewart's violation of trust. According to Stewart, the prosecutor's comments that Stewart violated his parental trust amounted to prosecutorial misconduct that deprived him of his Sixth and Fourteenth Amendment rights to an impartial jury. In addition, Stewart argues that the comments had nothing to do with the statutory elements of the crime because the references to the early childhood milestones preceded the alleged criminal conduct. Stewart did not object to the closing statements at trial. We conclude that Stewart's arguments lack merit because the statements went to an element of the crime of sexual assault with a minor under 14 years of age.

Generally, failure to object at trial bars appellate review of a trial issue. McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983). If, however, the issue is a constitutional question, then this court has the discretion to review the issue for plain error. Somee v. State, 124 Nev. ___, ___, 187 P.3d 152, 159 (2008). Plain error review requires this court to consider whether an error clearly exists and, if so, whether it prejudiced the defendant's substantial rights. Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005).

If, during closing argument, a prosecutor asserts his own personal opinion, urges the jury to convict a defendant on a basis other than the evidence, or appeals to the jurors' sympathies, then the prosecutor has committed misconduct. See Pantano v. State, 122 Nev. 782, 793, 138 P.3d 477, 484 (2006). Prosecutorial misconduct is prejudicial when it "so infect[s] the proceedings with unfairness as to result in a denial of due process." Anderson, 121 Nev. at 516, 118 P.3d at 187. But a prosecutor's comments, standing alone, should not generally overturn a criminal conviction. Id.

In the present case, the State charged Stewart with sexual assault with a minor under 14 years of age. NRS 200.366 provides in pertinent part: "A person who subjects another person to sexual penetration, . . . [and] the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault." (Emphasis added). Based on the elements of the crime, the State argues that it was necessary to show how C.T.'s trust in her father made her mentally incapable of resisting his conduct. We agree and conclude that the State's argument was proper.

Jury Instruction No. 8 was not improper

Jury Instruction No. 8 states: "There is no requirement that the testimony of a victim of sexual assault be corroborated, and her testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty." Stewart challenges Jury Instruction No. 8, arguing that this court should overturn Gaxiola v. State, 121 Nev. 638, 119 P.2d 1225 (2005). Stewart argues that Gaxiola allows jury instructions that assume there is a victim, focuses the jury's attention on the alleged victim's testimony, relies on an appellate standard of review for sufficiency of evidence, and confuses the jury by using the term "uncorroborated." We disagree.

In Gaxiola, this court upheld a similar jury instruction stating:

> This court has repeatedly stated that the uncorroborated testimony of a victim, without more, is sufficient to uphold a rape conviction. Furthermore, other courts have approved jury instructions to that effect. Moreover, we conclude that the instruction is significantly different from a "Lord Hale" instruction. "Lord Hale" instructions amount to a commentary on the evidence, by telling a jury that a category of witness testimony should be given greater

> scrutiny. A "no corroboration" instruction does not tell the jury to give a victim's testimony greater weight, it simply informs the jury that corroboration is not required by law.

121 Nev. at 648, 119 P.3d at 1232 (footnotes omitted). Thus, we conclude that Jury Instruction No. 8 was not improper.

The district court did not vindictively punish Stewart for exercising his right to a jury trial

Stewart argues that the district court engaged in vindictive sentencing because he exercised his right to a jury trial. According to Stewart, the district court judge was angry about the repeated victimizing of C.T. Further, Stewart argues that the district court considered Melanie a victim because of Stewart's alleged sexual assault against her. We disagree because the district court's sentences were within the statutory guidelines and supported by evidence.

"It is well established that a sentencing court may not punish a defendant for exercising his constitutional rights . . . ." Mitchell v. State, 114 Nev. 1417, 1428, 971 P.2d 813, 820 (1998) overruled on other grounds by Sharma v. State, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002) and Rosky v. State, 121 Nev. 184, 191 & n.10, 111 P.3d 690, 694 & n.10 (2005). But the defendant must prove "that the district court sentenced him vindictively." Id. In addition, this court has consistently afforded the district court wide discretion in its sentencing decision. See, e.g., Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). This court will refrain from interfering with the sentence imposed "[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." Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). Moreover, regardless of its severity, a sentence that is within the statutory limits is not "'cruel and unusual punishment unless the

statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996).

Here, the jury convicted Stewart of 11 counts of sexual assault with a minor under 14 years of age and 3 counts of lewdness with a minor under 14 years of age. All of the district court's sentences—lifetime sentences for each sexual assault conviction and twenty year sentences for each lewdness conviction—were within the statutory sentencing guidelines. In addition, the district court relied upon C.T.'s and Melanie's statements, both of which discussed the impact the molestation had on their lives. Finally, it appears that the district court's reference to Melanie as a victim was in the context of her child's molestation, as opposed to the alleged sexual assault on Melanie. Thus, we conclude that the district court's sentences were not vindictive, and therefore the district court did not violate Stewart's constitutional rights. We therefore

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Hardesty

_____, J.
Cherry

_____, J.
Gibbons

cc: Eighth Judicial District Court Dept. 18, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk