IN THE SUPREME COURT OF THE STATE OF NEVADA

MANUEL D. ORELLANA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50102

FILED

MAY 29 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of 4 counts of lewdness with a child under 14 years of age. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

On appeal, Orellana alleges that 2 of his 4 convictions for lewdness with a child under 14 years of age are redundant under NRS 201.230 because they were each part of a continuous and uninterrupted incident. We agree and therefore reverse two of his four lewdness convictions. However, we conclude that his prosecutorial misconduct argument, as well as his other remaining challenges to his conviction, fail.[1] Accordingly, we reverse the district court's judgment of conviction in

[1]Orellana also (1) contends that the State's charging document did not provide him with sufficient notice of the charges against him; (2) asserts that the district court erred by permitting J.C.'s aunt, Sandra, to testify to J.C.'s statements about the sexual abuse because the statements were hearsay and were admitted without a hearing on the statements' trustworthiness; (3) argues that three jury instructions were incorrect statements of the law; (4) challenges the sufficiency of the evidence, and (5) alleges that his sentence amounts to cruel and unusual punishment. Having carefully reviewed these separate challenges, we conclude that none warrant reversal.

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part and affirm in part. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Two of Orellana's convictions are redundant

When "a defendant receives multiple convictions based on a single act, we will reverse 'redundant convictions that do not comport with legislative intent.'" Braunstein v. State, 118 Nev. 68, 79, 40 P.3d 413, 421 (2002) (quoting Albitre v. State, 103 Nev. 281, 283, 738 P.2d 1307, 1309 (1987)). Strictly construing our criminal statutes in favor of the defendant, we nor mally presume that the Legislature "'did not intend multiple punishments for the same offense absent a clear expression of legislative intent to the contrary.'" Ebeling v. State, 120 Nev. 401, 404, 91 P.3d 599, 601 (2004) (quoting Talancon v. State, 102 Nev. 294, 300, 721 P.2d 764, 768 (1986)).

NRS 201.230 states, in relevant part, that a person is guilty of lewdness with a child if the person,

> willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child

Based on the phrase, "any lewd or lascivious act," the State alleges that the Legislature clearly intended to permit convictions for each individual act, regardless of whether the act occurred during the same incident, thus allowing a lewdness conviction for each separate physical touching even though the touchings occurred on the same day, sequentially, and without interruption. Alternatively, Orellana argues that an "act" means one incident; therefore, in his view, he could only be

convicted on two counts because there were only two separate incidents of when he inappropriately touched the victim, J.C.

In cases where a defendant has been convicted of lewdness and sexual assault, this court has stated that those crimes are "'mutually exclusive and convictions for both based upon a single act cannot stand.'" Gaxiola v. State, 121 Nev. 638, 651, 119 P.3d 1225, 1234 (2005) (quoting Braunstein, 118 Nev. at 79, 40 P.3d at 421). Thus, when a jury returns a guilty verdict for sexual assault and lewdness, the essential question is whether the predicate acts for each offense were interrupted or continuous. See, e.g., Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 285-86 (2004) (concluding that the defendant's convictions of lewdness and sexual assault were redundant because the acts were committed without interruption); Wright v. State, 106 Nev. 647, 650, 799 P.2d 548, 549-50 (1990) (concluding that defendant's lewdness and sexual assault convictions were not redundant because the defendant's acts were interrupted).

Here, J.C. testified that Orellana sequentially touched her genital area and her breasts on the outside of her clothing during both incidents, stating that, "[f]irst, he did one, and then he did the other one." Notably, this was the only evidence presented at trial that described the sexual abuse. Based on J.C.'s description, we conclude that Orellana's unlawful acts were continuous and uninterrupted. As a result, two of Orellana's four convictions are redundant and must be reversed. See Gaxiola, 121 Nev. at 651, 119 P.3d at 1234.

Prosecutorial misconduct

Orellana asserts that the prosecutor improperly commented on the reasonable doubt standard, as well as his failure to testify, during closing arguments. Although we conclude that reversal is unwarranted on

these grounds, we are troubled by the comments made by both the prosecution and the defense.

Reasonable doubt comment

Orellana argues that the prosecutor improperly commented on the reasonable doubt standard, and thereby lowered the State's burden of proof. We disagree.

This court has consistently and repeatedly "caution[ed] the prosecutors of this state that they venture into calamitous waters when they attempt to quantify, supplement, or clarify the statutorily prescribed reasonable doubt standard." Randolph v. State, 117 Nev. 970, 980-81, 36 P.3d 424, 431 (2001) (internal quotations omitted).

Here, in responding to Orellana's closing argument regarding reasonable doubt, the prosecutor commented that the jury could have doubts regarding the date that the incident occurred or the clothes that J.C. was wearing and, at the same time, carefully reiterated that the jury must find Orellana not guilty if it had any reasonable doubt about any material element of the charge. Since the prosecutor correctly clarified the reasonable doubt standard, see NRS 175.211(1) ("A reasonable doubt is one based on reason. It is not mere possible doubt."), we conclude that his comments were not improper.

However, we note that defense counsel's remarks during closing argument—stating that any doubt regarding any aspect of the case, no matter how small or immaterial, could constitute a reasonable doubt requiring acquittal—came close to constituting an impermissible comment regarding the reasonable doubt standard. Since these remarks may have implied that the defendant should be acquitted based upon some doubt as to an immaterial fact of the case, we hereby caution defense

counsel from straying too far away from the statutorily prescribed reasonable doubt standard. See id.

Failure to testify comment

Orellana alleges that the prosecutor improperly commented on his failure to testify. While we agree, we conclude that reversal based on the comment is not warranted.

In response to Orellana's closing argument the prosecutor stated that "[o]n child-molestation cases, people commit these crimes in private [and] [t]here's usually two people that know that this is happening, the abuser and the abused, and you heard from half of that equation here."

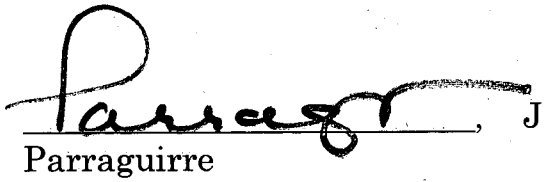
Because the prosecutor's statement that the jury only heard from one-half of the individuals involved in the incident indirectly commented on Orellana's failure to testify, the remark was improper. See Bridges v. State, 116 Nev. 752, 763-64, 6 P.3d 1000, 1008-09 (2000) (stating that an indirect reference to a defendant's constitutional right against self-incrimination would be impermissible if the jury would naturally or necessarily take it to be a comment on the defendant's failure to testify).

However, since the defense counsel immediately objected to the remarks, the prosecutor r ephrased his comments, and the district court promptly instructed the jury to disregard the remark and referred the jurors to the jury instruction stating that a defendant has the constitutional right to refrain from testifying, we conclude that the misconduct was not prejudicial. See Rose v. State, 123 Nev. 194, 208, 163 P.3d 408, 418 (2007) (stating that a conviction will not be overturned as a result of prosecutorial misconduct unless the misconduct is prejudicial).

CONCLUSION

For the reasons set forth above, we conclude that 2 of Orellana's 4 convictions for lewdness with a child under 14 years of age are redundant; therefore, we reverse, in part, on those grounds. However, we conclude that Orellana's remaining arguments on appeal lack merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART.



_____, J.
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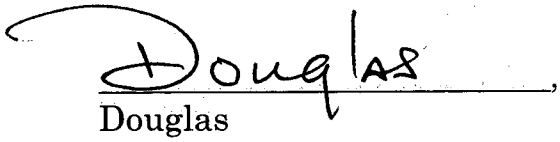

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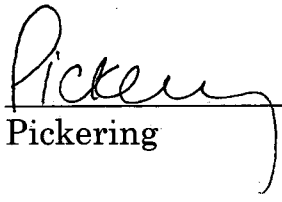

_____, J.
Pickering

cc: Hon. Jackie Glass, 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