IN THE SUPREME COURT OF THE STATE OF NEVADA

JODY ALEXANDER FURNARE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50755

FILED

MAY 27 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of five counts of sexual assault on a child under the age of sixteen. Sixth Judicial District Court, Humboldt County; John M. Iroz, Judge. The district court sentenced appellant Jody Furnare to five prison terms of 20 to life—one count to run consecutively, and the remaining counts to run concurrently.[1]

Furnare contends that the district court erred by (1) concluding that Furnare's statements taken in violation of Miranda v. Arizona, 384 U.S. 436 (1966), would be admissible as impeachment evidence if Furnare chose to testify; (2) admitting expert testimony although the State failed to provide notice of the witnesses and their proposed testimony in a timely manner; (3) denying Furnare's motion to strike the jury panel after Furnare's custody status was revealed during

[1]This court reversed Furnare's first judgment of conviction and remanded for a new trial. Furnare v. State, Docket No. 47714 (Order of Reversal and Remand, June 27, 2007).

jury selection; (4) directing counsel to conduct unrecorded sidebars, (5) denying a motion for a mistrial based on the State's repeated efforts to present inadmissible testimony, which forced defense counsel to make repeated objections and resulted in a prejudicial effect before the jury; and (6) allowing expert testimony regarding the cause of the victim's injuries without a sufficient showing of reliability and medical certainty. Furnare additionally claims that (7) the State presented insufficient evidence to support the number of charged sexual assaults, and (8) the district court erred in admitting hearsay testimony from Furnare's son during the sentencing hearing.

Admissibility of statement for impeachment

First, Furnare contends that the district court erred by concluding that his statement would be admissible for impeachment purposes if he decided to testify.[2] In particular, Furnare suggests, without any supporting analysis, that his statement was coerced and is therefore inadmissible for any purpose.

In reversing Furnare's first judgment of conviction, this court held that Furnare's statement was taken in violation of Miranda. Furnare, Docket No. 47714 (Order of Reversal and Remand, June 27, 2007). We have previously held that statements taken in violation of Miranda can be used for impeachment purposes. Allan v. State, 103 Nev. 512, 515, 746 P.2d 138, 140 (1987); accord Harris v. New York, 401 U.S.

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[2]This court reversed Furnare's first judgment of conviction, partially based on the admission of his statements during the initial trial. Furnare, Docket No. 47714 (Order of Reversal and Remand, June 27, 2007).

222, 225-26 (1971). In contrast, a coerced statement may not be used for any purpose, including impeachment. Mincey v. Arizona, 437 U.S. 385, 397-98 (1978). Here, however, Furnare has provided no cogent argument beyond the summary observation that his statement "was the result of coercion" to support his claim that the district court erred in admitting the statement for impeachment purposes, and we therefore decline to consider this claim.[3] See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (holding that "[i]t is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court").

Notice of witnesses

Second, Furnare contends that the district court erred by admitting testimony of two expert witnesses over his objection that the State did not supply notice of its intent to call these witnesses and did not disclose the content of their testimony prior to trial. We conclude that Furnare's contention lacks merit.

This court reviews a district court's decision to allow an unendorsed witness to testify for abuse of discretion. Mulder v. State, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000); Dalby v. State, 81 Nev. 517, 519, 406 P.2d 916, 917 (1965). NRS 174.234 governs the disclosure of witness

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[3]It appears that the district court based its conclusion that the statement was not coerced on this court's finding in Furnare's earlier appeal. However, this court's finding was limited to whether the statement was taken in violation of Miranda. Furnare has not provided this court with any documents demonstrating that his statement was coerced.

lists and information regarding expert testimony in criminal cases. Pursuant to NRS 174.234(2), if the State intends to call an expert witness, then at least 21 days before trial, the State must provide the defense: (a) a brief statement about the subject matter and substance of the expert's expected testimony, (b) a copy of the expert's curriculum vitae, and (c) a copy of any reports made by or at the direction of the expert. Under NRS 174.234(3), if the prosecution in bad faith fails to satisfy these requirements, then the district court must not allow the expert witness to testify and must also bar the prosecution from introducing any evidence that the expert would have produced. If the district court erroneously allows the evidence, then this court will reverse the defendant's conviction only if the error prejudiced the defendant. Jones v. State, 113 Nev. 454, 473, 937 P.2d 55, 67 (1997).

Furnare's claim focuses on two expert witnesses: Joann Behrman-Lippert, a clinical psychologist, and Debra Robison, a sexual assault nurse examiner. The record suggests that Furnare received notice of these expert witnesses but not 21 days before trial. The State provided notice of Behrman-Lippert's expected testimony on September 14, 2007, slightly less than 21 days before the October 2, 2007, trial. Robison was included as an expert witness in the witness list attached to the information and was included in an amended notice provided on September 21, 2007, approximately 10 days before trial.[4] The record

[4]The State contends that Robison was noticed during Furnare's first trial. However, those documents were not included in the record, and thus, we cannot consider them now.

further indicates that the State notified Furnare of the nature of the witnesses' testimony. The notices contained a short, concise description of both experts' proposed testimony—Behrman-Lippert was expected to testify regarding Furnare's "grooming" of the victim, and Robison was expected to testify regarding the S.A.R.T. examination results. Behrman-Lippert testified that she did not prepare a report and Robison's examination diagram was provided to Furnare prior to trial. To the extent that the State failed to comply with the time requirements in NRS 174.234(2), Furnare has not demonstrated that the State acted in bad faith or that the district court abused its discretion in admitting the testimony.

Reference to custody status

Third, Furnare contends that the district court erred by denying his motion to strike the jury panel after his custody status was revealed during jury selection. We conclude that Furnare's contention lacks merit.

This court has held that "[i]nforming the jury that a defendant is in jail raises an inference of guilt, and could have the same prejudicial effect as bringing a shackled defendant into the courtroom." Haywood v. State, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991). However, "this type of error is not always prejudicial rather than harmless." Id. "When the evidence of guilt is overwhelming, even constitutional error can be comparatively insignificant." Id.

In this case, a prospective juror revealed during voir dire that he had been employed at the detention center where Furnare had been an

inmate.[5] Any error based on the prospective juror's comments is harmless for three reasons. First, unlike in Haywood, the prosecutor in this case did nothing to elicit information about Furnare's custody status. Second, the district court instructed the jury to disregard the prospective juror's statement, and the jury is presumed to follow the district court's instructions. Leonard v. State, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001). Third, overwhelming evidence of guilt was presented. The victim testified of ongoing sexual assault and specified dates, locations, and times. And although a "victim's testimony alone is sufficient to uphold a conviction," Rose v. State, 123 Nev. 194, 203, 163 P.3d 408, 414 (2007), additional evidence was presented demonstrating Furnare's guilt. For example, the results from the S.A.R.T. examination supported the victim's testimony. Thus, the district court did not err in denying Furnare's motion to dismiss the jury panel.[6]

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[5]The panel member was excused after he disclosed that he had already formed an opinion regarding Furnare's guilt or innocence and could not disregard it.

[6]Furnare also asserts error on the ground that the victim emphasized his jail attire during trial. The victim merely described Furnare's attire while identifying him in court. Further, there is no indication from the record that Furnare was "compelled" to wear jail attire, as he now claims. Nevertheless, Furnare did not object below and we conclude that the victim's reference to his jail attire was insignificant and any error did not rise to the level of plain error affecting Furnare's substantial rights. See Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

Off-the-record sidebars

Fourth, Furnare contends that the district court abused its discretion by directing counsel to address objections and arguments in unrecorded sidebars. Furnare cites to three civil cases that do not support his proposition.[7] Furnare cites to no other law in support of his claim. Therefore, we decline to address this claim.[8] See Maresca, 103 Nev. at 673, 748 P.2d at 6.

Mistrial

Fifth, Furnare contends that the district court abused its discretion in denying a motion for mistrial based on the State's repeated efforts to have witnesses vouch for the victim's truthfulness. Furnare argues that the State's tactics and the district judge's repeated instructions to the jury to disregard testimony forced defense counsel to make repeated objections and prejudiced the proceedings before the jury.

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[7]Furnare cites Kockos v. Bank of Nevada, 90 Nev. 140, 520 P.2d 1359 (1974) and City of Las Vegas v. Bolden, 89 Nev. 526, 516 P.2d 110 (1973), which stand for the general proposition that when the appellant failed to provide an adequate record on appeal, this court will assume that the record supports the lower court's decision. He also cites Bates v. Chronister, 100 Nev. 675, 691 P.2d 865 (1984), which concluded that the general proposition did not apply when the appellant established a prima facie showing of prejudice on the partial record on appeal.

[8]We note that some sidebars were recorded and that after some unrecorded sidebars, Furnare was allowed to put his objections on the record. Furnare has not pointed to any instance in which he objected to the sidebar procedures or was precluded from making them part of the record. See Johnson v. State, 118 Nev. 787, 806, 59 P.3d 450, 462-63 (2002).

In Marvelle v. State, 114 Nev. 921, 931, 966 P.2d 151, 157 (1998), this court stated that "[i]t has long been the general rule that it is improper for one witness to vouch for the testimony of another." The rationale behind this rule is that the jury is charged with resolving the factual issues, judging the witnesses' credibility and ultimately determining whether the accused is guilty or innocent. See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) ("[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses."). Therefore, one witness may not vouch for the credibility of another witness.

Here, the State asked two witnesses about the victim's demeanor when she had discussed the abuse with them. One witness specifically testified that the victim appeared to be telling the truth, at which point the district court instructed the jury to disregard the statement. This essentially resulted in the witnesses vouching for the victim's credibility. Even if the testimony constituted improper vouching, we conclude that the error was harmless for three reasons. See Lisle v. State, 113 Nev. 540, 553, 937 P.2d 473, 481 (1997) (determining "'the harm caused by vouching depends in part on the closeness of the case'") (quoting U.S. v. Frederick, 78 F.3d 1370, 1378 (9th Cir. 1996)), clarified on other grounds on denial of rehearing by 114 Nev. 221, 954 P.2d 744 (1998). First, although the victim's credibility was important because her testimony was a major part of the State's evidence, the vouching consisted of two brief statements regarding the victim's demeanor. Second, the district court immediately instructed the jury to disregard any statement made as to the credibility of the victim, thus curing any prejudicial effect. Third, defense counsel's objections were not so numerous as to have a

deleterious effect.[9] Thus, the prejudicial effect of the vouching, if any, was inconsequential.

Admissibility of expert testimony

Sixth, Furnare contends that the district court erred by admitting nurse Robison's testimony regarding the cause of the victim's injuries without a sufficient showing of reliability and without testimony that the finding as to causation was based on any degree of medical certainty.

The decision to admit expert testimony is a question for the sound discretion of a trial court and the ruling of the trial court will not be disturbed upon appeal unless a clear abuse of discretion is shown. Mulder v. State, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000).

Nothing in the record suggests that the district court abused its discretion by admitting Robison's testimony, and Furnare does not support his argument with any specific allegations, other than claiming that Robison testified that "frequent penetration caused the accuser to suffer injuries."[10] Furnare's claim in his brief on appeal is summary and

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[9]Furnare objected twice during testimony regarding the victim's demeanor—once during the testimony of Jeff Dawson, a security officer with the school district, and once during the testimony of Officer Kathy Davis.

[10]Furnare provides a general reference to Robison's entire testimony. Despite Furnare's characterization of the testimony, Robison's actual testimony was that damage to the victim's hymen supported the victim's report of repeated sexual penetration prior to the onset of puberty and that the only other way that the injuries could have occurred was through an impalement-type injury, which also required penetration.

vague at best. Because Furnare has failed to present any cogent argument that would allow this court to properly review this claim, we decline to do so. Maresca, 103 Nev. at 673, 748 P.2d at 6.

Sufficiency of the evidence

Seventh, Furnare contends that the State presented insufficient evidence to support the five sexual assault charges, and purportedly, during closing only referenced two events. This claim is misleading and meritless.

The State presented evidence of separate sexual assaults on two specific dates. First, the victim testified, and the State argued in closing, that on October 28, 2004, Furnare sexually assaulted her orally and then by penile penetration. Second, the victim testified, and the State argued, that on November 4, 2004, Furnare sexually assaulted her again orally and by penile penetration. The victim further testified to several other instances of digital penetration, oral penetration, and penile penetration. The evidence is sufficient to support the five counts. See Peck v. State, 116 Nev. 840, 849, 7 P.3d 470, 475 (2000) (noting that forced digital penetration and sexual intercourse were separate and distinct acts of sexual assault), overruled on other grounds by Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006); Townsend v. State, 103 Nev. 113, 121, 734 P.2d 705, 710 (affirming separate convictions for fondling a victim's breasts and digitally penetrating the victim); Deeds v. State, 97 Nev. 216, 216-17, 626 P.2d 271, 272 (1981) (affirming separate convictions for fellatio and sexual assault); Wicker v. State, 95 Nev. 804, 806, 603 P.2d 265, 266-67 (1979) (affirming three separate convictions for intercourse, sodomy, and fellatio).

Hearsay at sentencing

Eighth, and last, Furnare summarily argues that he should be resentenced because the district court admitted hearsay during the sentencing hearing. In particular, Furnare complains that the district court erred in considering a letter written by Furnare's son, and read into the record by a victim advocate, discussing the emotional injury that resulted from his father's acts. Without much explanation, Furnare relies on Buschauer v. State, 106 Nev. 890, 804 P.2d 1046 (1990). Furnare did not object below on hearsay grounds,[11] thus we review for plain error. See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); NRS 178.602. The trial court's determination regarding the admissibility of evidence during a sentencing hearing will not be disturbed on appeal absent an abuse of discretion. Wesley v. State, 112 Nev. 503, 519, 916 P.2d 793, 804 (1996).

The son's statement was limited in scope and did not reference any facts not previously raised or any specific prior acts by the defendant. Thus, it does not appear that the more detailed notice and cross-examination protections afforded in Buschauer, 106 Nev. at 893-94, 804 P.2d at 1048, were warranted with respect to the statement. Further, Furnare did not request a continuance and has not explained how he was

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[11]Furnare suggested below that his son was not a "victim" for purposes of NRS 176.015. He does not make this argument on appeal, and it is clear that his son meets the definition of a "victim" as he is the victim's brother. NRS 176.015(5)(a)(3), (b)(3) (providing that the brother of a person against whom a crime has been committed is a "victim" for purposes of NRS 176.015 and therefore may make a victim impact statement at sentencing).

prejudiced by any lack of notice, particularly given the limited scope of the statement. See Green, 119 Nev. at 545, 80 P.3d at 95 (explaining that defendant is required to demonstrate actual prejudice to prove that defect affected substantial rights); see also Wood v. State, 111 Nev. 428, 430, 892 P.2d 944, 945 (1995) (explaining that sentencing court is permitted to consider evidence that is not admissible at trial, as 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"). Thus, the district court did not abuse its discretion in admitting Furnare's son's written statement during the sentencing hearing.

Having considered Furnare's contentions and determined that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.

Parraguirre, J.

Douglas, J.

Pickering, J.

cc: Sixth Judicial District Court Dept. 2, District Judge
Humboldt-Pershing County Public Defender
Attorney General Catherine Cortez Masto/Carson City
Humboldt County District Attorney
Humboldt County Clerk