IN THE SUPREME COURT OF THE STATE OF NEVADA

GORDON D. RAE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52634

FILED

MAY 28 2010

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 six counts of lewdness with a child under 14 years of age. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Appellant Gordon Rae raises multiple challenges to his judgment of conviction for multiple improper acts against two victims, M.B. and I.H. For the following reasons, we conclude that none of Rae's arguments have merit and, therefore, affirm the district court's judgment of conviction.[1]

[1]Rae also contends that (1) the State's charging document failed to provide him with adequate notice of the charges against him and, as a result, the jury was also improperly instructed in this regard; (2) the district court should not have allowed I.H.'s parents to testify because their testimony was irrelevant; (3) the district court erred by preventing Rae from questioning how old M.B.'s mother was when she was sexually abused; (4) multiple witnesses improperly vouched for the victims' accusations; (5) the prosecutor engaged in numerous instances of misconduct warranting reversal; (6) there was insufficient evidence to support his conviction; (7) cumulative error warrants reversal; and (8) his sentence is unconstitutional. Having thoroughly reviewed all of Rae's additional alleged errors, we are not convinced that any of them have merit or warrant further discussion by this court.

Jury selection—for-cause challenges

Rae argues that his due process rights were violated because the district court rejected two of his for-cause challenges of jurors who purportedly admitted bias in favor of children.

During jury selection, Rae's counsel asked jurors multiple questions concerning whether they had a propensity to believe a child more than an adult. The two allegedly biased jurors responded that they believed most children learned how to lie in order to get out of trouble.

Having reviewed the record, we disagree with Rae's characterization that the jurors expressed bias in favor of children. Instead of admitting bias in favor of children, the two potential jurors recognized that children are capable of telling lies. Accordingly, the district court's decision to deny Rae's for-cause challenges was not improper. Blake v. State, 121 Nev. 779, 795, 121 P.3d 567, 577 (2005) ("[T]he district court enjoys broad discretion in ruling on challenges for cause.").

Admission of M.B.'s hearsay statement

Rae contends that the district court erred by permitting M.B.'s mother to testify as to M.B.'s out-of-court statements about his allegedly improper conduct. We disagree.

Under NRS 51.385(1), statements of a child under 10 years old describing an act of sexual conduct or physical abuse performed on the child are admissible if there is a hearing outside the presence of a jury regarding their trustworthiness, and the child testifies at the proceeding or is unavailable or unable to testify. See NRS 51.385(1)(b). The trustworthiness of a statement is determined by whether "(a) [t]he statement was spontaneous; (b) [t]he child was subjected to repetitive questioning; (c) [t]he child had a motive to fabricate; (d) [t]he child used

terminology unexpected of a child of similar age; and (e) [t]he child was in a stable mental state." NRS 51.385(2).

Here, the district court conducted the requisite NRS 51.385 hearing regarding the admissibility of M.B.'s statements to her mother. After doing so, the district court admitted M.B.'s initial disclosure of the abuse but excluded some of M.B.'s subsequent statements during a two-week period prior to the police being notified. The district court concluded that M.B.'s initial disclosure "was spontaneous in that it came out of the blue." However, the district court concluded that her subsequent statements were not admissible because M.B. was "subjected to questioning over a 10 to 14 day period by her parents." Based upon our review of the record and the district court's thorough analysis, we cannot conclude that the district court abused its discretion in admitting the initial statement. See, e.g., Archanian v. State, 122 Nev. 1019, 1029, 145 P.3d 1008, 1016 (2006) (reviewing the admission of evidence for an abuse of discretion).

Competency of child witnesses

Although he failed to object to M.B. or I.H.'s competency at trial, Rae argues that NRS 51.385 mandates that the district court conduct a competency hearing for all child witnesses who are under 10 years old at the time the hearsay statement is made. We disagree and conclude that this argument is misplaced.

NRS 51.385 does not address witness competency. NRS 51.385 is contained within Nevada's statutory scheme relating to hearsay exceptions, see NRS 51.075-.385, and only pertains to the admissibility of out-of-court statements made by a child under the age of 10.

Nevada's general rule of competency is set forth in NRS 50.015, which states that "[e]very person is competent to be a witness

except as otherwise provided in this title." Nevada's statutory scheme relating to witnesses and evidence does not treat the competency of a witness younger than 10 years any differently than any other witnesses. See generally NRS Title 4, Witnesses and Evidence.

Furthermore, the competency of a witness is an inquiry that is made prior to the testimony of a witness at trial and has nothing to do with the competency or age of the witness at the time a hearsay statement was made. Therefore, M.B.'s and I.H.'s ages at the time they made their hearsay statements have no bearing on their competency at trial.[2]

Jury instructions

Rae argues that the district court erred in instructing the jury in four respects: (1) the district court failed to instruct the jury on the specific intent element required to sustain a conviction for lewdness, (2) the district court erred by rejecting his proposed instruction relating to the credibility of child witnesses, (3) the district court improperly instructed the jury that a victim-witness's testimony does not need to be corroborated, and (4) the reasonable doubt instruction lowered the State's burden of proof by indicating that only material elements need to be proven beyond a reasonable doubt. We reject each of Rae's challenges.

First, contrary to Rae's assertion, the district court instructed the jury on the specific intent element for lewdness: "The offense of Lewdness with a Minor requires an intent of arousing, appealing to, or

---

[2]We similarly reject Rae's argument that M.B. and I.H. were incompetent to testify because they were under 10 years of age; both witnesses were over 10 years of age at the time they testified at trial (M.B. was 11 and I.H. was 17) and there was no indication that either M.B. or I.H. was not competent to testify.

gratifying the lust, passions, or sexual desires of the defendant or [M.B.] and/or [I.H.] This element must be proven beyond a reasonable doubt." Thus, the premise of Rae's argument is incorrect.

Second, Rae's proposed instruction regarding the credibility of child witnesses was substantially covered by the district court's general instruction regarding the believability of witness testimony. See Nay v. State, 123 Nev. 326, 330, 167, P.3d 430, 433 (2007) (explaining that it is not an abuse of discretion to reject a proposed jury instruction that is substantially covered by other instructions.).

Third, Nevada law clearly states that victim testimony does not need to be corroborated to sustain a conviction in sexual misconduct cases. See, e.g., Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005). Thus, the district court's instruction in this regard was proper.

Fourth, the reasonable doubt instruction given in this case closely mirrors the statutory requirement and has been upheld in numerous previous cases. See NRS 175.211(1); Evans v. State, 112 Nev. 1172, 1190-91, 926 P.2d 265, 277 (1996). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

/ Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Eighth Judicial District Court Dept. 15, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk