

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT ROMANO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54303

FILED

APR 28 2011

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *J. Mod*
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of 4 counts of sexual assault of a minor under 14 years of age and 4 counts of lewdness with a child under the age of 14. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

The underlying case stems from appellant Robert Romano's sexual abuse of his daughter, J.R. When J.R. was about four years old, she began spending approximately four nights per week at Romano's apartment. After about three months of this arrangement, J.R.'s mother, Mary, began noticing changes in J.R.'s behavior. One day, J.R. told Mary that Romano had abused her sexually. Mary retrieved a tape recorder, asked J.R. questions about the abuse, and recorded J.R.'s responses. Mary then contacted Child Protective Services (CPS) and took J.R. to a hospital, where she was interviewed by Officer Luis Norris. Afterward, J.R. was interviewed by Detective Jay Roberts and CPS Investigator William Sheldon. In each of these interviews, J.R. alleged that Romano had sexually abused her. A grand jury indicted Romano and, as his trial date approached, he fled to Key West, Florida, where he lived for about two and a half years under the false name "Robert Russo." Ultimately, he was apprehended in Florida, returned to Nevada, tried, and convicted.

On appeal, Romano argues that: (1) he did not knowingly and intelligently waive his Miranda rights; (2) his statement to police was not voluntary; (3) the district court abused its discretion by denying his motion to compel a psychological examination of J.R.; (4) the district court abused its discretion by admitting J.R.'s out of court statements; (5) the district court erred by admitting evidence that he was featured on the television show "America's Most Wanted"; (6) the State failed to present sufficient evidence to sustain his convictions; and (7) cumulative error warrants reversal of his convictions.¹

For the reasons set forth below, we affirm the district court's judgment of conviction. As the parties are familiar with the facts of this case, we do not recount them further except as necessary for our disposition.

Romano knowingly and intelligently waived his Miranda rights

Romano asserts that the district court should not have admitted his statement to the police because he did not knowingly and

¹Romano also argues that the district court erred by: (1) admitting his entire custodial interview; (2) admitting evidence of his flight; (3) admitting photographs of J.R. as a young child; (4) allowing the defense expert to answer the State's questions concerning forensic interviews of other children; (5) allowing two of the State's witnesses to vouch for J.R.'s credibility; (6) allowing a CPS investigator to testify as an expert witness; (6) allowing the State to commit misconduct by asking him to comment on J.R.'s credibility; (7) providing the jury with several erroneous instructions; and (8) refusing to give his requested jury instruction regarding the mandatory penalties he faced if convicted. We have thoroughly reviewed all of Romano's arguments, and we conclude that they are without merit.

intelligently waive his rights afforded by Miranda v. Arizona, 384 U.S. 436 (1966).

Standard of review

Whether a waiver of Miranda rights is knowing and intelligent is a question of fact and is reviewed for clear error. Mendoza v. State, 122 Nev. 267, 276, 130 P.3d 176, 181 (2006).

Romano's waiver was effective

A defendant's statements made during a custodial interrogation may be admitted at trial only after Miranda warnings have been administered and validly waived. Koger v. State, 117 Nev. 138, 141, 17 P.3d 428, 430 (2001). A valid waiver of Miranda rights must be knowing and intelligent. Miranda, 384 U.S. at 444. We examine the totality of the circumstances to determine whether a defendant's waiver was knowing and intelligent. Mendoza, 122 Nev. at 276-77, 130 P.3d at 181-82.

Although Romano claims that a sedative he had taken prior to the interview impaired his judgment, the record demonstrates that the sedative did not affect his ability to understand his waiver. See Stewart v. State, 92 Nev. 168, 170-71, 547 P.2d 320, 321 (1976) ("Intoxication without more will not preclude the admission of incriminating statements unless it is shown that the defendant was so intoxicated that he was unable to understand the meaning of his statements."). Detective Roberts fully informed Romano of his rights when he arrested him. Romano acknowledged that he understood his rights and agreed to speak with Detective Roberts. In Romano's interview, he did not just give "yes" or "no" answers; he gave lengthy and articulate responses that demonstrated he was fully cognizant of what he was doing and saying. Indeed, Romano's answers described himself as a good father and Mary as a terrible mother.

Additionally, Romano recalled specific events that occurred months before the interview. We conclude that the totality of the circumstances show that Romano knowingly and intelligently waived his Miranda rights.

Romano's statement to police was voluntary

Romano asserts that the district court should not have admitted his statement to the police because it was not voluntary.

Standard of review

We review de novo whether a custodial statement is voluntary. Rosky v. State, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005).

Romano's statement was voluntary

"A confession is admissible only if it is made freely and voluntarily, without compulsion or inducement." Passama v. State, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987). We examine the totality of the circumstances to determine whether the defendant's will was overborne when he confessed. Mendoza, 122 Nev. at 276, 130 P.3d at 181-82. Factors relevant to voluntariness include: "[t]he youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep." Dewey v. State, 123 Nev. 483, 492, 169 P.3d 1149, 1155 (2007) (internal quotations omitted).

Romano is an adult. He is also an intelligent individual, having started a lucrative limousine service. The mere fact that there was a 45-minute lapse of time between the time Detective Roberts read Romano his rights and the time Romano gave his statement does not render Romano's statement involuntary. See Koger, 117 Nev. at 144, 17 P.3d at 433 (rejecting defendant's claim that her waiver of her Miranda rights was not voluntary despite the fact that 12 days passed between her

Miranda warnings and her interrogation). Romano's detention and interview was not unreasonably lengthy. Detective Roberts did not make any threats, use physical force, or make promises to Romano in exchange for his statement. Although Detective Roberts expressed sympathy and minimized the seriousness of the charges against Romano, these techniques are permissible. See Sheriff v. Bessey, 112 Nev. 322, 328, 914 P.2d 618, 622 (1996) ("[I]nterrogation techniques such as offering false sympathy, blaming the victim, minimizing the seriousness of the charge, using a good-cop/bad-cop routine, or suggesting that there is sufficient evidence when there is not" are permissible techniques so long as they do not "produce inherently unreliable statements or revolt our sense of justice."). The interview was conducted between 8 a.m. and 10 a.m., and there is no showing that Romano was deprived of sleep or food. The record indicates that Detective Roberts offered Romano water and attempted to make him as comfortable as possible. We conclude that the totality of the circumstances demonstrate that Romano's statement was voluntary, and thus the district court properly admitted his statement.

The district court did not abuse its discretion by denying Romano's motion to compel a psychological examination of J.R.

Romano contends that the district court abused its discretion by denying his motion to compel a psychological examination of J.R. because the district court misapplied the factors from Abbott v. State, 122 Nev. 715, 138 P.3d 462 (2006), for determining whether a defendant is entitled to the psychological examination of a child witness in a sexual assault case. We cannot agree.

Standard of review

The decision to grant or deny a defendant's request for a psychological examination of a child victim is reviewed for an abuse of discretion. Abbott, 122 Nev. at 723, 138 P.3d at 467.

Romano was not entitled to a psychological examination of J.R.

To determine whether to order a psychological examination of a child sexual assault victim, the district court must consider three factors: (1) whether the State called or benefited from a psychological expert, (2) whether the evidence of the offense is supported by little or no corroboration beyond the testimony of the victim, and (3) whether there is a reasonable basis for believing that the victim's mental or emotional state may have affected his or her veracity. Id. at 724, 727-31, 138 P.3d at 468, 470-73.

The State benefited from psychological experts

[I]n situations . . . where [an] investigating officer has training in interviewing child sexual assault victims, describes techniques used to determine truthfulness, analyzes the facts of the interview, and/or states whether there was evidence that the victim was coached or biased against the defendant, the investigating officer will be deemed a psychological expert for the purposes of [determining whether the State benefitted from a psychological expert].

Id. at 730, 138 P.3d at 472.

Although the State did not call a psychological expert, Officer Norris testified regarding his interview of J.R. He stated that he had been trained to conduct interviews of young children and stated the importance of not asking leading questions and not showing emotion. Officer Norris testified that he employed these safeguards during his interview of J.R. to ensure the accuracy of J.R.'s statements.

Investigator Sheldon testified that he had experience and training in forensic interviews of children. He stated that he had attended several conferences in which he learned techniques for interviewing children, such as asking questions that call for detailed responses. He testified that he had conducted thousands of interviews, and that J.R. answered his questions in greater detail than many of the children he had interviewed.

Thus, the jury heard testimony regarding the techniques and safeguards utilized to ensure a truthful and accurate accounting by the child victim. This testimony went beyond a mere recitation of the facts of the interviews and addressed many of the very issues that Abbott held constitute expert psychological testimony. See Abbott, 122 Nev. at 727-28, 138 P.3d at 470-71. We therefore conclude that, for the purpose of this determination, Officer Norris and Investigator Sheldon testified as psychological expert witnesses, and that the State benefited from their testimony. See id. As discussed below, however, the remaining two Abbott factors strongly weigh against granting Romano's motion for a psychological examination of J.R. Id. at 724, 138 P.3d at 468 ("[W]hether the State utilizes . . . a psychological expert, is merely a factor to be considered" in determining whether the defendant is entitled to a psychological examination of the child victim.).

Evidence of the offense was supported by corroboration beyond the testimony of the victim

Romano's voluntary statement to Detective Roberts was introduced at trial. In his statement, Romano initially denied any touching, but as the interview progressed, he conceded that some innocent touching occurred. In addition to admitting to sleeping in the same bed as J.R., Romano stated that J.R. had grabbed his penis, that he had

inadvertently touched J.R.'s vagina with his nose and moustache, that J.R. was sexually curious, and that J.R. would strike sexy poses. He admitted that when J.R. had caught him masturbating, he told her that the semen he ejaculated was "lotion," which coincided with the terminology J.R. used when describing the abuse. In sum, there was substantial corroborating evidence of Romano's offense beyond the testimony of J.R.

There was not a reasonable basis for believing that J.R.'s mental or emotional state may have affected her veracity

Romano contends that Mary planted the allegations of sexual abuse in J.R.'s mind in order to keep him from obtaining custody of J.R. However, these allegations and speculation do not demonstrate a reasonable basis for believing that J.R.'s mental or emotional state affected her veracity. J.R.'s statements to her mother, Officer Norris, Detective Roberts, and Investigator Sheldon were consistent. She described, in great detail, her allegations against Romano, and she never recanted. The evidence indicates that J.R.'s mental and emotional states were sound. Moreover, the evidence also showed that Romano had not made any actual attempts to obtain custody, which undermines his claim that Mary was a vindictive mother who had planted the allegations in J.R.'s mind in order to keep Romano from obtaining custody. We therefore conclude that based upon the second and third Abbott factors, the district court did not abuse its discretion when it determined that Romano failed to show a compelling need for a psychological examination of J.R.

The district court did not abuse its discretion by admitting J.R.'s out of court statements

Romano asserts that the district court erred by admitting the out of court statements J.R. made to Officer Norris, alleging that Romano had sexually abused her.

Standard of review

The district court's decision to admit evidence is reviewed for an abuse of discretion. Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006).

J.R.'s statements were admissible

Under NRS 51.065, hearsay is generally inadmissible, subject to exceptions. Hearsay is defined as an out of court statement "offered in evidence to prove the truth of the matter asserted." NRS 51.035. An exception to the general hearsay rule is found in NRS 51.385(1), which authorizes the admission of a statement made by a child under the age of 10 describing sexual abuse if the child testifies and the district court determines in a hearing outside the presence of the jury, that the statement contains sufficient guarantees of trustworthiness. To determine the trustworthiness of a statement, NRS 51.385(2) directs the district court to consider whether:

- (a) The statement was spontaneous;
- (b) The child was subjected to repetitive questioning;
- (c) The child had a motive to fabricate;
- (d) The child used terminology unexpected of a child of similar age; and
- (e) The child was in a stable mental state.

J.R. testified at trial and was subject to cross-examination. During a hearing outside the presence of the jury, the district court determined that J.R.'s statements contained sufficient guarantees of trustworthiness. Although the police initiated the interview of J.R., she made many of her allegations spontaneously. The interview was the first such interview by law enforcement, and Officer Norris did not ask repetitive or suggestive questions. Terminology used by J.R. to describe

the abuse was consistent with a child of J.R.'s age. Finally, there was no evidence that J.R. was mentally unstable. Accordingly, the district court did not abuse its discretion by admitting J.R.'s out of court statements to Officer Norris.²

The district court did not commit plain error by admitting evidence that Romano was featured on "America's Most Wanted"

Romano argues that the district court erred by admitting evidence that he was featured on the television show, "America's Most Wanted" because it was unfairly prejudicial.

Standard of review

Because Romano did not object to the introduction of this evidence at trial, we review for plain error. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). An error is plain if it affects the defendant's substantial rights. Id.

Evidence that Romano was featured on "America's Most Wanted" was unfairly prejudicial but does not amount to plain error

"All relevant evidence is admissible." NRS 48.025(1). "[R]elevant evidence' means 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." NRS 48.015. Relevant evidence may be excluded "if its probative value is

²Romano also contends that admission of these statements violated his Sixth Amendment right to confront witnesses. Because J.R. was available for cross-examination at trial, and was indeed cross-examined by Romano, the admission of this testimony did not violate Romano's right to confrontation. See Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004) ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.").

substantially outweighed by the danger of unfair prejudice.” NRS 48.035(1).

Romano was apprehended based on an anonymous tip police received after he was featured on “America’s Most Wanted.” Arguably, the underlying basis of Romano’s capture was relevant to explain the course of the police’s investigation and apprehension of Romano in Florida. This marginal probative value, however, is substantially outweighed by the danger that the jury might conclude that Romano was not just a fugitive, but was a member of the group of the worst of the worst fugitives that are typically featured on the show. See U.S. v. Baker, 432 F.3d 1189, 1219 (11th Cir. 2005) (testimony that defendant had been featured on “America’s Most Wanted” had “virtually no probative value” yet was “unfairly prejudicial [by] essentially telling the jurors to believe that [the defendant] is guilty of the charged offenses because he appeared on [a] well-known television program[] featuring individuals that police consider responsible for committing crimes”). We therefore conclude that evidence that Romano had been featured on “America’s Most Wanted” was unfairly prejudicial and should not have been admitted by the district court.

Nonetheless, given the substantial evidence of Romano’s flight, the jury would have learned Romano was a fugitive even without introduction of evidence that Romano was featured on “America’s Most Wanted.” Romano testified that he changed his name because he knew he was a fugitive and he did not want to be discovered on the Internet. Thus, the jury would have learned that Romano was a fugitive and that he believed he was wanted for a crime sufficiently heinous that he could be located on the Internet. See Carr v. State, 689 So. 2d 283, 286 (Fla. Dist. Ct. App. 1996) (holding that although it was error to allow the jury to

learn that the defendant had been featured on “America’s Most Wanted,” the error was harmless because the jury already knew that she had been a fugitive).

In addition, “America’s Most Wanted” was only mentioned twice during the entire trial. First, the State commented in its opening statement that “[y]ou’ll hear that finally last year having previously been on America’s Most Wanted and whatnot, the defendant was found living under another name and arrested in Florida and brought back to face the charges.” Next, Key West Detective Franklin Cohens testified that he received an anonymous tip for a wanted fugitive that had been featured on the show and that he used a picture from the show to identify Romano. Romano has failed to demonstrate how these passing references affected his substantial rights. See Ford v. Curtis, 277 F.3d 806, 811 (6th Cir. 2002) (concluding that although “references to the F.B.I.’s Ten Most Wanted List and to ‘America’s Most Wanted’ were of nominal relevance and prejudicial,” the error did not warrant reversal because the improper evidence was not “so overwhelming that it substantially affected the jury’s verdict”). We therefore conclude that, although the district court committed error in admitting evidence that Romano was featured on “America’s Most Wanted,” the error was not plain and did not affect Romano’s substantial rights to warrant reversal.

The State presented sufficient evidence to support Romano’s convictions

Romano contends that the State failed to present sufficient evidence to support his convictions. We disagree.

Standard of review

In reviewing whether there is sufficient evidence to support a jury’s verdict, we consider “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could

have found the essential elements of the crime beyond a reasonable doubt.” Rose v. State, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007) (quoting Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998)).

Substantial evidence supported the verdict

Romano was convicted of 4 counts of sexual assault of a minor under 14 years of age, and 4 counts of lewdness with a minor under 14 years of age. J.R. testified³ that Romano placed his penis in her mouth while they were in his bedroom and living room. She testified that on another occasion, Romano placed his penis in her mouth when her brother was visiting. J.R. also testified that Romano had licked and kissed her vagina at both his apartment and his house. In addition, J.R. testified that Romano would slide his penis up and down on her body and push it against her vagina. She testified that this occurred while she was lying in bed and on one occasion while she was in a bathtub. Finally, Officer Norris testified that J.R. told him that she would masturbate Romano’s penis. She told him that she would do this during the day and during the night. Accordingly, we conclude that sufficient evidence supported Romano’s convictions.

³Romano argues that J.R.’s testimony was not sufficiently particularized to support his convictions. This argument is meritless. See LaPierre v. State, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992) (explaining that we will uphold a conviction so long as the victim testifies “with some particularity regarding the incident” and noting that “the testimony of a sexual assault victim alone is sufficient to uphold a conviction”).

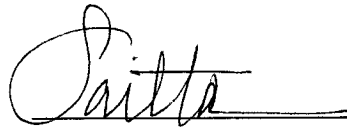
Cumulative error does not warrant reversal

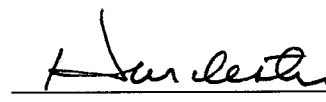
Romano contends that cumulative error warrants reversal of his convictions. We disagree.

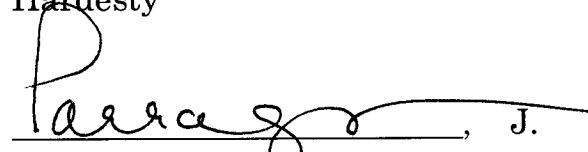
In addressing a claim of cumulative error, we consider: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 15, 17, 992 P.2d 845, 854-55 (2000). Here, although Romano was charged with serious crimes, the question of guilt is not close and the two passing references at trial to "America's Most Wanted" do not amount to cumulative error. Thus, we conclude that cumulative error does not warrant reversal.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.

 _____, J.
Saitta

 _____, J.
Hardesty

 _____, J.
Parraguirre

cc: Hon. Michael Villani, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk