IN THE SUPREME COURT OF THE STATE OF NEVADA

GEORGE DESALES MORSE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55271

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of lewdness with a child under 14 years of age and two counts of sexual assault of a child under 14 years of age. Eighth Judicial District Court, Clark County; David Wall, Judge. Appellant George Morse raises four issues.

First, Morse claims that the district court erred in admitting out-of-court statements of the child victim. We agree, but conclude that the error is harmless. The three-year-old victim, who was also Morse's step-granddaughter, related the abuse to family members on the day it occurred and to a police detective soon thereafter. The State gave Morse notice that it would be using these statements at trial and the district court held a hearing to determine their admissibility under NRS 51.385. At the hearing, the State declared that it would call the victim to testify at trial only if the district court did not admit her out-of-court statements.[1]

[1]Upon finding the victim's hearsay statements reliable, the district court did not proceed with a scheduled hearing to determine whether the victim was competent to testify. We reject Morse's contention that a district court must determine a child declarant's competency before it admits the declarant's hearsay statement, as considerations regarding the

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The district court determined that each of the statements to family members was sufficiently reliable and admitted them, but excluded the victim's statement to the detective. Our review of the record leads us to conclude that the district court did not abuse its discretion in its reliability determination. See Pantano v. State, 122 Nev. 782, 790-91, 138 P.3d 477, 482-83 (2006).

However, the court not only failed to find that the victim was "unavailable or unable to testify" at trial, NRS 51.385(1)(b), but it seemed to accept the prosecutor's assertion that she would choose whether to call the witness based upon the court's ruling on the victim's hearsay statements. This was error. See Felix v. State, 109 Nev. 151, 189, 849 P.2d 220, 246 (1993) (noting that unavailability finding "should be made carefully and based on substantial evidence"). Nonetheless, the error was harmless. The admitted statements were nontestimonial and therefore did not implicate Morse's Confrontation rights. See Crawford v. Washington, 541 U.S. 36, 61 (2004); see also Pantano, 122 Nev. at 791, 138 P.3d at 483 (concluding that statements of child victim to parents were nontestimonial). Additionally, the victim's statements were reliable to a degree that "cross-examination would add little," Felix, 109 Nev. at 181, 849 P.2d at 241; NRS 51.075(1), and substantial evidence beyond these statements—including Morse's statements admitting to acts supporting each count charged—supports the convictions.

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ability of the child to relate information truthfully necessarily overlap with the factors to be considered when assessing the reliability of the hearsay statement. Compare Wilson v. State, 96 Nev. 422, 423, 610 P.2d 184, 185 (1980), with NRS 51.385(2).

Second, Morse contends that the State committed reversible error when it violated Brady v. Maryland, 373 U.S. 83 (1963). A police detective disclosed during her testimony that the victim had been sent for a sexual assault examination, a fact unknown to both the prosecution and the defense. The report produced from that examination disclosed that the victim had no physical signs of abuse. After Morse moved for a mistrial, the district court found that because the type of assault alleged would not result in physical findings, Morse was not prejudiced by not having the report earlier. On appeal, Morse claims that a report that found no signs of abuse would be exculpatory and that, because the report also stated that the three-year-old victim was "advanced for her age," it would have been favorable evidence that bolstered Morse's defense that the child initiated the sexual contact and Morse was only passively compliant with the child's advances. We are unpersuaded that there is a reasonable probability that the outcome of Morse's trial would have been different if this information were before the jury, see Jimenez v. State, 112 Nev. 610, 619, 918 P.2d 687, 693 (1996), and conclude that the district court did not err in denying Morse's mistrial motion.

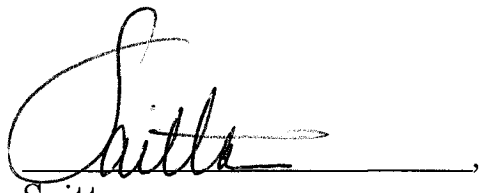
Third, Morse asserts that the district court erred when it admitted evidence of his confession. A detective transported Morse from his house to the police station. En route, Morse made various inculpatory statements, which the detective recorded. At the station, the detective read Morse his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), and Morse confessed. The district court suppressed the statements that Morse made in the vehicle, but admitted the Mirandized station interview. On appeal, Morse cites Missouri v. Seibert, 542 U.S. 600 (2004), in support of his contention that the failure to give Miranda warnings before the first custodial interrogation requires suppression of the second. We disagree. The discussion in the vehicle was informal,

conversational, and frequently veered away from the topic of Morse's "mistake." Upon entering the more formal setting of the interview room, Morse would have faced a genuine choice about whether to continue speaking or invoke his right to silence. We therefore conclude that the Miranda warnings that preceded the interview were effective. See Seibert, 542 U.S. at 614-15; Oregon v. Elstad, 470 U.S. 298, 311-14 (1985). Accordingly, the district court did not err in admitting this evidence.

Fourth, Morse claims that, given his age, lack of prior criminal history, and service to his country in the Korean War, his sentence constitutes cruel and unusual punishment. Morse does not argue that the sentencing statues are unconstitutional and we conclude that the sentence imposed is not grossly disproportionate to the crime; therefore, it is constitutionally valid. See Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004).

Having considered Morse's contentions and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.



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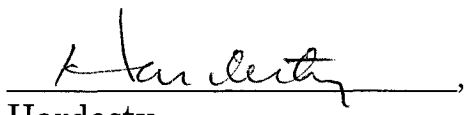

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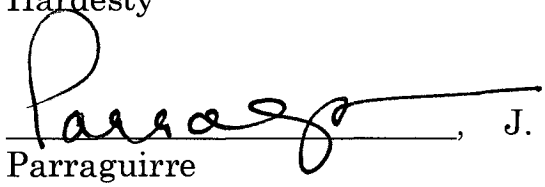

_____, J.
Parraguirre

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