IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHELLE LYN TAYLOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56056

FILED

OCT 27 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

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. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge.

Appellant Michelle Taylor ("Taylor") was convicted of lewdness with a child under 14 years of age. At trial, the State introduced photographs of text messages Taylor exchanged with the boy's mother, Patricia E., even though the chain of custody on Taylor's phone had some inconsistencies. The district court also admitted a school picture of the boy, E.E., at trial. The State used an abstract of judgment[1] for Taylor's felony theft conviction in Indiana to impeach Taylor. Because lewdness with a child under the age of 14 carries a mandatory life sentence, Taylor was sentenced to life with the possibility of parole after ten years.

Taylor now appeals, arguing (1) that her sentence is cruel and unusual in violation of both the United States and Nevada Constitutions, (2) that the district court abused its discretion in admitting the pictures of the text messages, (3) that the district court abused its discretion in admitting the school picture of E.E., and (4) that the district court abused

[1]An "abstract of judgment" is "[a] copy or summary of a judgment." Black's Law Dictionary 10 (9th ed. 2009).

its discretion in allowing the State to impeach Taylor by admitting the abstract of judgment from Indiana.[2]

We conclude that Taylor's sentence is not cruel or unusual. We further conclude that the district court (1) improperly admitted the pictures of the text messages, but that the error was harmless, (2) did not abuse its discretion in admitting the school picture of E.E., and (3) did not abuse its discretion in allowing the State to impeach Taylor by admitting the abstract of judgment from Indiana. Thus, we affirm Taylor's conviction.

Because the parties are familiar with the facts and procedural history in this case, we do not recount them further except as is necessary for our disposition.

Taylor's sentence is constitutional

Taylor argues that a life sentence, as required under NRS 201.230, amounts to cruel and unusual punishment in violation of both the United States and Nevada Constitutions as applied under the facts of this case. We disagree.

---

[2]Taylor also argues that the district court erroneously gave the transitional jury instruction informing the jury of the correct process in which to consider the alternative count of statutory sexual seduction because it was not a neutral jury instruction. However, Taylor concedes that she failed to object to the jury instruction. Generally, the failure to object to a jury instruction precludes appellate review. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). However, this court has discretion to review the jury instruction for plain error. Id. To establish plain error, the defendant must show that there was "actual prejudice or a miscarriage of justice." Id. We conclude that the giving of the transitional jury instruction did not amount to plain error.

The Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishment, and therefore, "forbids . . . extreme sentences that are 'grossly disproportionate' to the crime." Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (quoting Solem v. Helm, 463 U.S. 277, 288, 303 (1983)); U.S Const. amend. VIII. Similarly, this court has held that "[a] sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 222 (1979)).

NRS 201.230(1) states:

> A person who 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, is guilty of lewdness with a child.

Because Taylor does not challenge the constitutionality of the statute, we are faced only with the question of whether the statutory sentence is grossly disproportionate to the offense. In this case, the State presented evidence that Taylor straddled E.E., a 13 year old boy, removed her shirt, placed E.E.'s hand on her breast, and asked him to have sex with her. Taylor's actions fall within the conduct that NRS 201.230(1). NRS 201.230(2) requires as punishment for a first-time offender, "imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served, and may be further punished by a fine of not more than $10,000."

This was sufficient evidence to convict Taylor of violating NRS 201.230 and the district court sentenced her to life in prison with the possibility of parole after ten years. Here, the statute's required sentence is not so unreasonably disproportionate to the offense as to shock the conscience. Thus, Taylor's sentence violates neither the United States nor the Nevada Constitutions.

The district court abused its discretion in admitting the text messages, but the error was harmless

Taylor argues that the district court abused its discretion when it admitted the photographs of the text messages because the State failed to lay a proper foundation for the photographs. We agree.[3] However, the admission of these photographs was harmless error given the substantial evidence supporting the conviction.

The State did not lay a proper foundation for the text message photographs

Taylor argues that the district court abused its discretion in admitting the photographs of the text messages because the court ruled on their admissibility before the witness identified them and before the State laid a basic foundation to establish their relevance to the case. She contends that the State failed to lay a proper foundation linking the text

[3]Taylor also argues that the district court should not have admitted the photographs because it should have granted her motion to suppress the text messages when Deputy Sean Munson changed his testimony, the chain of custody of Taylor's phone was faulty, and the photographs were not the best evidence of the text messages. We conclude that these arguments lack merit.

messages to the phone, linking the phone's saved contact "Patty" to Patricia E., and linking Patricia E.'s saved contact "Michelle T" to Taylor.

Before the district court may admit evidence, the party must authenticate it through "evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims." NRS 52.015(1). "The government need only make a prima facie showing of authenticity so that a reasonable juror could find that the document is what it purports to be." Thomas v. State, 114 Nev. 1127, 1148, 967 P.2d 1111, 1124 (1998).

Nevada has not adopted a standard for authenticating text messages. However, other jurisdictions have dealt with this issue. Some jurisdictions allow photographs of the text messages along with other evidence supporting the authenticity of the photographs. State v. McLaughlin, 935 A.2d 938, 942 (R.I. 2007); Dickens v. State, 927 A.2d 32, 36-37 (Md. Ct. Spec. App. 2007). Other jurisdictions will admit text messages after looking at the circumstances surrounding the exchange of the text messages (i.e., the content of the text messages, who would have the background knowledge to send those text messages, and whether the parties conventionally communicated by text message). See, e.g., State v. Thompson, 777 N.W.2d 617, 625-26 (N.D. 2010). If there is enough evidence supporting the authenticity of the text messages, the court will admit them. See, e.g., id.

Here, Taylor's mother testified that the phone seized from the apartment was Taylor's phone, Taylor admitted in a police interview that it was her phone, and the police detectives testified that the phone submitted as evidence was the one seized from Taylor's apartment when she was arrested. However, the phone's Subscriber Identity Module ("SIM

card") and cellular provider recorded information contained in the text message. This information would properly authenticate the photographs of the text messages and the State should have used it. Thus, we conclude that the district court did abuse its discretion in admitting the photographs of the text messages because there was insufficient evidence to authenticate the text messages. However, we conclude that the admission of these photographs was a harmless error given the substantial evidence supporting the conviction. See, e.g., Zana v. State, 125 Nev. 541, 545 n.3, 216 P.3d 244, 247 n.3 (2009) (reviewing the erroneous admission of testimony for harmless error).

The district court did not abuse its discretion in admitting E.E.'s school picture

Taylor argues that the district court abused its discretion in admitting EE's school picture because it was not relevant and the probative value was outweighed by unfair prejudice. We disagree.

NRS 48.015 defines relevant evidence as "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." However, relevant evidence is not admissible when its probative value is substantially outweighed by the danger of unfair prejudice. NRS 48.035(1).

One element of the statutory crime of lewdness with a child under the age of 14 that the State must prove is that the child is under the age of 14. See NRS 201.230(1). The State used the school picture of E.E. to aid in proving this element of NRS 201.230. Even if the school picture did invoke some jury sympathy, the prejudice from that jury sympathy would not be prejudicial enough to substantially outweigh the probative

value of the school picture. Thus, we conclude that the district court did not abuse its discretion in admitting the school picture of E.E.

The district court did not abuse its discretion in admitting the abstract of Taylor's Indiana felony judgment of conviction

Taylor argues that the district court abused its discretion in admitting the Indiana abstract of judgment for two reasons: (1) Taylor's Indiana felony sentence was for less than one year so the State could not use it to impeach her, and (2) a judgment of conviction was necessary to prove the felony conviction and an abstract is not a judgment of conviction. We disagree.

This court reviews a decision to admit a prior conviction for an abuse of discretion. Warren v. State, 121 Nev. 886, 896, 124 P.3d 522, 529 (2005). To impeach a party with a prior conviction, the State must "prove the conviction with a judgment of conviction." Id. at 897, 124 P.3d at 529.

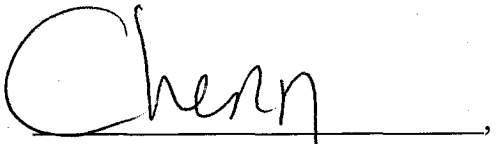
NRS 50.095 allows evidence of a conviction to impeach the credibility of a witness if the crime was punishable by imprisonment for more than one year. An Indiana court convicted Taylor of theft-receiving stolen property which is punishable by up to three years in prison. See Ind. Code §§ 35-43-4-2, 35-50-2-7 (2002). Thus, the district court did not abuse its discretion in allowing the State to impeach Taylor with her Indiana felony conviction.

Before the district court admitted the Indiana abstract of judgment, it heard testimony outside the presence of the jury from an Indiana court clerk that the abstract was the equivalent of a judgment of conviction and that the court Taylor was convicted in used an abstract of judgment instead of a judgment of conviction. Further, the abstract contained all the information a judgment of conviction is required to

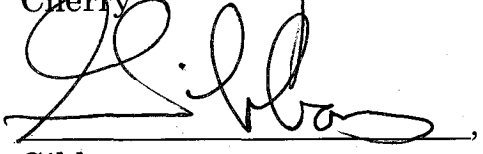
contain in Nevada. See NRS 176.105. Thus, we conclude that the district court did not abuse its discretion in admitting the abstract of judgment to prove Taylor's Indiana felony conviction.

Accordingly, we affirm Taylor's conviction.

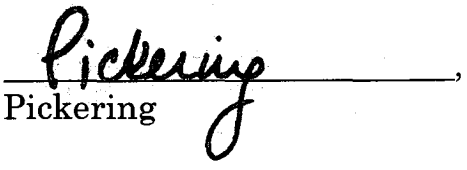
It is so ORDERED.



_____, J.
Cherry



_____, J.
Gibbons



_____, J.
Pickering

cc: Hon. J. Michael Memeo, District Judge
Elko County Public Defender
Donald T. Bergerson
Attorney General/Carson City
Elko County District Attorney
Doborah Tamar Fleischaker
Julie A. Cavanaugh-Bill
Elko County Clerk