IN THE SUPREME COURT OF THE STATE OF NEVADA

LERONE GIBSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57193

FILED

JUL 15 2011

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 two counts of child abuse and one count of child neglect. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Sufficiency of the evidence

Appellant Lerone Gibson contends that insufficient evidence supports his child neglect conviction because the State failed to prove that he willfully allowed S.G. to miss a year of school. We disagree, because the evidence, when viewed in the light most favorable to the State, is sufficient to support this conviction beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

At trial, the State introduced evidence demonstrating that Gibson's daughter S.G. missed at least 47 days of school during the second semester of the 2008-2009 school year. The jury heard testimony that once a student misses 10 days of school he or she cannot get credit for that semester, S.G. got F grades due to her absences, S.G. often stayed home to take care of her dad or to help him with her siblings or around the house, and when S.G. stayed home from school Gibson was home too. From this

evidence a rational juror could reasonably infer that Gibson committed child neglect. See NRS 200.508(2). It is for the trier of fact to determine the weight and credibility to give to conflicting testimony and the jury's verdict will not be disturbed where, as here, substantial evidence supports the verdict. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Gibson also contends that insufficient evidence supports his convictions for child abuse because he was acting as a disciplinarian when he hit the children and corporal punishment alone does not constitute child abuse. We disagree.

The jury heard testimony that Gibson hit J.G., who was approximately ten years old, two to three times with an extension cord for wearing a weather-inappropriate top and not combing her hair before school. Gibson hit eleven-year-old L.G. at least once with an extension cord for not combing his hair before school. The jury saw pictures of both of the childrens' red, welted, and bleeding wounds. From this evidence a rational juror could reasonably infer that Gibson committed child abuse. See NRS 200.508(1).

Jury instructions

Gibson alleges that the district court erred by declining to give several of his proposed jury instructions. We review the "district court's decision to issue or not to issue a particular jury instruction for an abuse of discretion." Ouanbengboune v. State, 125 Nev. ___, ___, 220 P.3d 1122, 1129 (2009).

First, Gibson contends that the district court erred by denying his proposed instruction on two reasonable interpretations because it minimized the State's burden of proof. We conclude that the district court did not abuse its discretion because the jury was properly instructed on

reasonable doubt. See NRS 175.211(1); Bails v. State, 92 Nev. 95, 97-98, 545 P.2d 1155, 1156 (1976).

Second, Gibson alleges that the district court erred by declining to give his proposed instructions "which set forth the defense theory of the case that the State had not proven each and every element of the charged crimes." Gibson also asserts that the court erred by denying his instructions regarding reasonable corporal punishment and the State's burden to prove intent. We conclude that the court did not abuse its discretion by declining to give these instructions because they contained inaccurate or misleading statements of the law. See NRS 200.508(1), (2); NRS 432B.150; Crawford v. State, 121 Nev. 744, 754, 121 P.3d 582, 589 (2005); Childers v. State, 100 Nev. 280, 282-83, 680 P.2d 598, 599 (1984) (discussing the requisite intent for conviction under child abuse statute).

Third, Gibson contends that the district court should have given his proposed instruction defining the word "intent" because it accurately cited the discussion of the nature of mens rea in Finger v. State, 117 Nev. 548, 570, 27 P.3d 66, 81 (2001). Finger involved a discussion of mens rea in the context of the insanity defense, Gibson did not raise an insanity defense, and the proposed instruction was contrary to an instruction defining intent previously approved by this court for use in a child abuse prosecution. See Childers, 100 Nev. at 282-83, 680 P.2d at 599; see also Crawford, 121 Nev. at 754, 121 P.3d at 589. Thus, the district court did not abuse its discretion by declining this instruction.

Fourth, Gibson alleges that the district court erred by declining to give his proposed instructions on battery. A defendant is not entitled to an instruction on a lesser-related offense. Peck v. State, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000), overruled on other grounds by Rosas

v. State, 122 Nev. 1258, 147 P.3d 1101 (2006). Accordingly, Gibson has failed to demonstrate an abuse of discretion. To the extent Gibson invites this court to require that juries be instructed on lesser-related offenses, we decline his invitation.

Fifth, Gibson contends that the district court erred by declining to give his proposed reverse flight instruction. Gibson cites no authority requiring the giving of such an instruction and we conclude he has failed to demonstrate that the district court abused its discretion.

School attendance records

Gibson asserts that the district court erred by admitting S.G.'s school records because they contain multiple hearsay statements. We disagree. The attendance officer testified that attendance is taken on a daily basis by classroom teachers and inputted into the school district computer system which generates the attendance records. Therefore, the records fall within the business records exception to the hearsay rule, see NRS 51.135, and the district court did not abuse its discretion by admitting them, see Chavez v. State, 125 Nev. ___, ___, 213 P.3d 476, 484 (2009) (the evidentiary rulings of the district court are reviewed for an abuse of discretion).

Gibson also contends that the admission of S.G.'s school attendance records through a school district attendance officer violated the Confrontation Clause because he did not have an opportunity to confront the persons who actually entered the data. Whether a defendant's Confrontation Clause rights were violated is a question of law subject to de novo review. Id. We conclude that the assertions made in the attendance records were not testimonial within the meaning of the Confrontation Clause because an objective witness would not reasonably

believe that the records could be used in a future trial. See Melendez-Diaz v. Massachusetts, 557 U.S. ___, ___, 129 S. Ct. 2527, 2539-40 (2009) (noting that business records are generally not testimonial in nature); Harkins v. State, 122 Nev. 974, 987, 143 P.3d 706, 714 (2006) (identifying the relevant factors to be used in determining whether a hearsay statement is testimonial). Accordingly, the attendance records were not subject to the Confrontation Clause and Gibson was not entitled to cross-examine the persons who entered the data reflected in the records, see Davis v. Washington, 547 U.S. 813, 821 (2006) (only testimonial hearsay is subject to the Confrontation Clause).

Finally, Gibson asserts that the district court erred by denying his motion for a mistrial based on the State's pretrial disclosure of a different version of the attendance records than was admitted at trial. The decision to deny a mistrial is within the discretion of the district court and this court will not disturb the district court's decision "absent a clear showing of abuse." Rose v. State, 123 Nev. 194, 206-07, 163 P.3d 408, 417 (2007) (internal quotation marks omitted). The district court examined both versions of the attendance records, determined that they contained the same information but were formatted differently, and denied the motion for mistrial. We conclude that Gibson has failed to demonstrate an abuse of discretion.

Testimony of CPS investigator

Gibson alleges that the district court erred by allowing the Child Protective Services (CPS) investigator to testify as an expert witness regarding the cause of J.G.'s wounds. The district court overruled Gibson's objection and allowed the investigator to offer her opinion that the wounds were consistent with being struck with an extension cord. We

conclude Gibson has failed to demonstrate that the district court abused its discretion in this regard because the opinion was not based on specialized, technical, or scientific knowledge. See NRS 50.275; Thompson v. State, 125 Nev. ___, ___, 221 P.3d 708, 713 (2009).

Gibson also asserts that the district court erred by allowing the investigator to speculate regarding the nature of the injury to J.G.'s leg. We disagree. The investigator testified that she took pictures of J.G.'s injuries, the pictures accurately depicted the injuries, and described the injury shown in one of the photographs. Gibson has failed to demonstrate that the district court abused its discretion by allowing this testimony because the investigator's testimony demonstrated that she had personal knowledge of the nature of the injury described. See NRS 50.025.

Bad act evidence

Gibson contends that the district court erred by denying his motion for a mistrial after the CPS investigator, while describing a photograph of L.G.'s injuries, mentioned "old scarring." The district court denied Gibson's motion for a mistrial, noting that the photograph was admitted without objection, the jurors could see whatever was visible in the photograph, and it had sustained Gibson's objection and instructed the jury to disregard the investigator's comment. The district court did not abuse its discretion by denying Gibson's motion for a mistrial. See Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992) (inadvertent references to prior bad acts, not solicited by the State, can be cured by immediately admonishing the jury to disregard the statement).

Prosecutorial misconduct

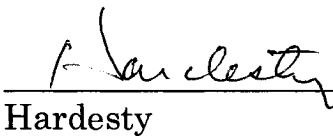
Gibson contends that the prosecutor engaged in misconduct during closing argument by displaying a power point slide that stated

Gibson never enrolled S.G. in home school. The district court sustained Gibson's objection and instructed the jury to disregard the statement. Even assuming that the prosecutor's statement was improper, we conclude that Gibson has failed to demonstrate prejudice, and no relief is warranted. See Browning v. State, 124 Nev. 517, 533, 188 P.3d 60, 72 (2008) ("[P]rejudice from prosecutorial misconduct results when a prosecutor's statements so infect the proceedings with unfairness as to make the results a denial of due process." (alteration omitted) (internal quotation marks omitted)); Valdez v. State, 124 Nev. 1172, 1193-94, 196 P.3d 465, 479 (2008) (finding no prejudice resulting from prosecutorial misconduct where objection was sustained and the jury instructed to disregard the comment).

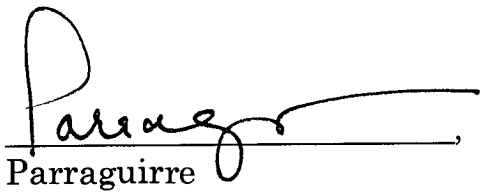
Having considered Gibson's contentions and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Saitta



_____, J.
Hardesty



_____, J.
Parraguirre

cc: Hon. Linda Marie Bell, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk