IN THE SUPREME COURT OF THE STATE OF NEVADA

SALVANA MARIA FERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57479

FILED

JUL 01 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 entered pursuant to a jury verdict of child abuse resulting in substantial bodily harm. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge.

Appellant Salvana Maria Fernandez contends that the district court erred by giving the second paragraph of instruction 12 to the jury. This paragraph provides

> In order to convict the defendant of the charged offense, you must find beyond a reasonable doubt that the defendant intentionally permitted or allowed a child to be placed in a situation that a reasonable person would not and must know or have reason to know that doing so will subject the child to abuse or neglect.

Fernandez claims that "the 'reasonable person' and the 'or have reason to know' language contained in [this] instruction negates both the 'knowingly' and 'intentionally' requirements mandated" by this court's disposition of her first appeal. We disagree.

Fernandez argued in her first appeal that NRS 200.508 was unconstitutionally vague and the State responded that this court had previously rejected a vagueness challenge to this statute in Smith v. State,

112 Nev. 1269, 927 P.2d 14 (1996), abrogated in part on other grounds by City of Las Vegas v. Dist. Ct., 118 Nev. 859, 59 P.3d 477 (2002).

In Smith, this court considered whether "the phrase in NRS 200.508(1)(a) and (b) 'placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect,'" was unconstitutionally vague.[1] Smith, 112 Nev. at 1275, 927 P.2d at 17. This court read the provisions in NRS 200.508(1) in conjunction with the definitions in NRS 200.508(3) for "allow" and "permit" and determined "that both definitions establish the same requirement: a person acts unreasonably and is therefore criminally liable if she knows or has reason to know of abuse or neglect yet permits or allows the child to be subject to it." Id. at 1277, 927 P.2d at 18. The Smith court concluded that this requirement "adequately defines the state of mind required for a finding of guilt and effectively precludes punishment for inadvertent or ignorant acts." Id. And the court held that NRS 200.508(1) was not vague because its terms were adequately defined so that the defendant had notice that her conduct was prohibited. Id. at 1276, 927 P.2d at 18.

In Fernandez's first appeal, the majority of this court determined that the charging document improperly suggested that Fernandez could be convicted on a theory of negligence; the jury was not instructed, in accordance with Smith, that it must find that Fernandez acted intentionally, unreasonably, and knowingly before she could be

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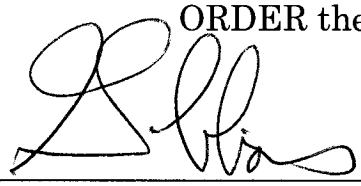
[1]NRS 200.508 has been amended several times since Smith was decided. The relevant provisions of NRS 200.508 have not changed significantly; however, the numbering of these provisions has changed. Compare NRS 200.508(1), (2), (4), with 1995 Nev. Stat., ch. 443, § 71, at 1193-94.

convicted of child abuse or neglect; and, therefore, the jury "could have convicted Fernandez based on an unconstitutional application of the statute." Fernandez v. State, Docket No. 48127 (Order of Reversal and Remand, February 25, 2008), at 3-4. The majority rejected the dissent's argument that another instruction was sufficient to cure the failure to instruct the jury in accordance with the holding in Smith and stated that in order to support a conviction under Smith's interpretation of NRS 200.508(2), "[t]he defendant must act intentionally, by permitting or allowing a child to be placed in a situation that a reasonable person would not and must know or have reason to know that doing so will subject the child to abuse or neglect." Id. at 4. And the majority concluded "that NRS 200.508 was unconstitutionally applied . . . because the jury was not properly instructed on the elements of the charge that [this court] held in Smith rendered the statute constitutional." Id. at 5.

Here, the language used in instruction 12 is consistent with our holding in Smith, which is controlling precedent, and substantially reflects the majority's ruling in Fernandez's first appeal, which is the law of the case, see Hsu v. County of Clark, 123 Nev. 625, 629, 173 P.3d 724, 728 (2007) ("The doctrine of the law of the case provides that the law or ruling of a first appeal must be followed in all subsequent proceedings, both in the lower court and on any later appeal."). Nothing in the record indicates that the district court settled the jury instructions in an arbitrary or capricious manner. And the error that occurred in the first trial was not repeated in this trial because the amended charging document did not suggest that Fernandez could be convicted under a theory of negligence and the jury was properly instructed on the essential elements of the crime and the state of mind requirements that must be found to sustain a conviction for child abuse or neglect. Accordingly, we

conclude that the district court did not abuse its discretion by giving the second paragraph of instruction 12 to the jury, see Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (reviewing the district court's jury instruction for abuse of discretion or judicial error), and we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Gibbons

_____, J.
Pickering

cc: Hon. J. Michael Memeo, District Judge
Brian D. Green
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk

CHERRY, J., dissenting:

I respectfully disagree with the majority's conclusion that the district court did not abuse its discretion by using "reasonable person" and "or have reason to know" language in its "requisite intent" instruction to the jury. The objective viewpoint underlying the reasonable person standard sets the bar too high for parents and caregivers, like Fernandez, who have cognitive limitations, and precludes the jury from engaging in a subjective consideration of the defendant's abilities and limitations when deciding whether the defendant had the requisite intent to commit child abuse or neglect. Here, the second paragraph of instruction 12 was unnecessary and, in my view, erroneously given to the jury. The language included in this paragraph negates the knowing and intentional elements of the alleged crime thereby allowing the jury to convict Fernandez on an improper basis. Certainly, Smith, 112 Nev. 1269, 927 P.2d 14, did not envision a conviction under the facts and circumstances of this unfortunate case. I would reverse the judgment of conviction and remand this case to the district court for a new trial.

Cherry, J.

Cherry