IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM BILLY JACK CARON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58792

FILED

NOV 29 2012

TRACIE K. LINDEMAN
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ORDER OF AFFIRMANCE

This is an appeal from a conviction, pursuant to a jury verdict of 10 counts of sexual assault with a child under 14 years of age and 4 counts of lewdness with a child under 14 years of age. Third Judicial District Court, Lyon County; Leon Aberasturi, Judge.

Appellant William Caron's conviction stems from his conduct with 5 minor girls, and he appeals his conviction on the following grounds: (1) the State presented insufficient evidence to support Caron's convictions on counts 10 through 14; (2) the district court abused its discretion by denying Caron's motion to sever the cases where the 5 victims alleged different types of abuse over a two-year period and the incidents were not related; (3) the convictions for sexual assault and lewdness violated the Double Jeopardy Clause and resulted in impermissible redundant convictions on counts 5 and 9; (4) the district court abused its discretion by admitting prior bad acts evidence; (5) the State changed its theory of prosecution after the close of its case, and as a result, deprived Caron of due process rights to notice and a fair trial; (6) the district court erred by rejecting several of Caron's proffered jury instructions; and (7) the

sentence imposed constituted cruel and unusual punishment.[1] We conclude that no error occurred in this case and affirm the judgment of conviction.[2]

The State presented sufficient evidence to support Caron's convictions

Caron argues that the State presented insufficient evidence to sustain his conviction for counts 10 through 14. We disagree.

"The Due Process Clause of the United States Constitution requires that an accused may not be convicted unless each fact necessary to constitute the crime with which he has been charged is proven beyond a reasonable doubt." Rose v. State, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007). To determine whether due process requirements are met, "[t]he standard of review in a criminal case is '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.'" McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). "[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses," and "a verdict supported by substantial evidence will not be disturbed by a reviewing court." Id.

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[1]Caron also argues on appeal that the charging document and verdict forms improperly led the jury to convict him on alternate theories. This court will not consider this argument because it is not a developed, cogent argument. See Browning v. State, 120 Nev. 347, 361, 91 P.3d 39, 50 (2004) (declining to address an argument where appellant did "not provide[ ] any cogent argument, legal analysis, or supporting factual allegations").

[2]The parties are familiar with the facts and procedural history of this case; therefore, we do not recount them further except as is necessary for our disposition.

"When considering the sufficiency of the evidence in sexual assault cases, [this court has] held that the victim's testimony alone is sufficient to uphold a conviction." Rose, 123 Nev. at 203, 163 P.3d at 414. However, "[a]lthough the victim's testimony need not be corroborated, . . . 'the victim must testify with some particularity regarding the incident in order to uphold the charge.'" Id. (quoting LaPierre v. State, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992)). This court has "acknowledged that 'child victims are often unable to articulate specific times of events' and have difficulty recalling 'exact instances when the abuse occurs repeatedly over a period of time.'" Id. (quoting LaPierre, 108 Nev. at 531, 836 P.2d at 58). Thus, "to support multiple charges of sexual abuse over a period of time, a child victim need not 'specify exact numbers of incidents, but there must be some reliable indicia that the number of acts charged actually occurred.'" Id. (quoting LaPierre, 108 Nev. at 531, 836 P.2d at 58).

Here, the jury found Caron guilty on: count 10 - sexual penetration of K.K. in a residence near Dayton; count 11 - sexual penetration of K.K. in a residence near Stagecoach; count 12 - sexual penetration of K.K. in a truck in the desert between Silver Springs and Stagecoach; count 13 - lewdness with A.K. by touching her vagina in a residence near Dayton; and count 14 - lewdness with A.K. by touching her vagina in a residence near Stagecoach.

With respect to counts 10 through 12, Caron asserts that K.K. did not provide sufficient detail regarding her age, the type of vehicle driven by Caron, or a location more specific than "the desert." K.K. described several instances of sexual assault, including once in Caron's bedroom, several times in Caron's vehicle driving from Silver Springs to Stagecoach, and several times in Caron's garage in his Stagecoach

residence. Although she could not specify how many times Caron had assaulted her, she testified that the assaults began when she was 9 and continued until she was 11. She further testified that Caron likely assaulted her more than 20 times, and that 15 of those times occurred in Caron's vehicle driving from Silver Springs to Stagecoach. A nurse later testified that a physical examination of K.K. showed several injuries consistent with sexual assault. While K.K. did not provide a specific number of the times that she was sexually assaulted, we conclude that the testimony, when viewed in the light most favorable to the prosecution, was sufficient for a rational trier of fact to find Caron guilty beyond a reasonable doubt of counts 10, 11 and 12. See Rose, 123 Nev. at 203, 163 P.3d at 414.

With respect to counts 13 and 14, Caron asserts that A.K. could not place the timing of any event and her testimony was "virtually non-existent." A.K. testified that Caron touched her in his bedroom on 3 occasions, either over her clothes or under her clothes. She could not describe what time of year it was, but she knew that the events occurred in Caron's bedroom, and she was also able to identify her age at the time of the events. Thus, we conclude that the State provided sufficient evidence to support the jury's verdict on counts 13 and 14.

The district court did not abuse its discretion in denying Caron's motion to sever the charges

Caron argues that the district court abused its discretion when it refused to sever the cases because having five child witnesses testify at trial unfairly prejudiced him since the charged assaults occurred at separate times, in separate places, and with separate victims.

However, Caron, through prior counsel, stipulated to consolidate his cases before the district court. In so stipulating, Caron and

the State agreed that consolidating Caron's cases was "in the best interest of both parties and . . . in the interest of judicial economy," and that "[Caron had] further consulted and discussed consolidation of both cases with his prior attorney and believe[d it was] in his best interest to stipulate and agree to consolidation" of the cases. "Stipulations are of an inestimable value in the administration of justice, and valid stipulations are controlling and conclusive and both trial and appellate courts are bound to enforce them." Bean v. State, 86 Nev. 80, 100, 465 P.2d 133, 146 (1970) (citation omitted).

"The decision to sever is within the discretion of the district court, and an appellant has the 'heavy burden' of showing that the court abused its discretion." Floyd v. State, 118 Nev. 156, 164, 42 P.3d 249, 255 (2002) (quoting Amen v. State, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990)), overruled on other grounds by Grey v. State, 124 Nev. 110, 117-18, 178 P.3d 154, 160 (2008). The district court concluded that because there was a stipulation, Caron had not satisfied his burden of demonstrating prejudice. We agree and conclude that the district court did not abuse its discretion when it declined to sever Caron's cases.

Caron's convictions for sexual assault and lewdness did not violate the Double Jeopardy Clause

Caron argues that his convictions for count 5 (sexual assault against a child under the age of 14) and count 9 (lewdness with a child under the age of 14) violate the Double Jeopardy Clause because the counts concern the same incident with the same victim. We disagree.

"A claim that a conviction violates the Double Jeopardy Clause is generally subject to de novo review on appeal." Davidson v. State, 124 Nev. 892, 896, 192 P.3d 1185, 1189 (2008). "The Double Jeopardy Clause of the United States Constitution protects defendants from multiple

punishments for the same offense. This court utilizes the test set forth in Blockburger v. United States[, 284 U.S. 299 (1932),] to determine whether multiple convictions for the same act or transaction are permissible." Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003). "Under this test, 'if the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses.'" Id. (quoting Williams v. State, 118 Nev. 536, 548, 50 P.3d 1116, 1124 (2002)).

In this case, count 5 was based forced fellatio in the bedroom of Caron's Stagecoach house during a six-month time period, and count 9 was based on forced masturbation at or near the Stagecoach house during the same six-month time period. These charges involve different conduct and the evidence indicates that the conduct occurred at different times on the same day. Thus, we conclude that the Double Jeopardy Clause does not prohibit convictions for counts 5 and 9.

The district court did not abuse its discretion by admitting prior bad acts evidence

Caron argues that the district court abused its discretion by improperly admitting the following prior bad act evidence: (1) testimony from K.G. that she was sexually assaulted by another individual; (2) S.G.'s testimony about incidents that occurred in Carson City; (3) the State's question to K.K. about whether Caron's inappropriate conduct with her happened 20 times; (4) the testimony of the defense psychologist expert on the theory of grooming; and (5) a jailhouse informant's testimony about the sexual assaults on the 5 girls by other men in Caron's presence. For the reasons discussed below, we conclude Caron's argument lacks merit.

The determination of whether to admit or exclude evidence of

prior bad acts rests within the sound discretion of the district court and will not be disturbed absent manifest error. See Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002); Jones v. State, 113 Nev. 454, 466-67, 937 P.2d 55, 63 (1997); see also NRS 48.045(2) (referring to prior bad act evidence as "[e]vidence of other crimes, wrongs or acts"). In order to overcome the general presumption of inadmissibility, the district court must conduct a hearing outside the presence of the jury and find that (1) the prior act is relevant to the crime charged for a purpose other than proving propensity, (2) the act is proven by clear and convincing evidence, and (3) the evidence's probative value is not substantially outweighed by the danger of unfair prejudice. Bigpond v. State, 128 Nev. ___, ___, 270 P.3d 1244, 1250 (2012); Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 677 (2006). Even if no such hearing is held, reversal is not mandated where "the record is sufficient to determine that the evidence is admissible under the test for admissibility of prior bad act evidence," discussed above, or "where the result would have been the same if the trial court had not admitted the evidence." Ledbetter, 122 Nev. at 259, 129 P.3d at 677 (quoting Rhymes v. State, 121 Nev. 17, 22, 107 P.3d 1278, 1281 (2005)).

Caron argues that K.G.'s testimony regarding her assault by another individual and S.G.'s testimony concerning certain incidents that occurred in Carson City were inadmissible bad act evidence because the State's purpose for introducing the evidence was to prove motive. However, Caron did not oppose the admission of this prior bad acts evidence in his objection to the State's motion to admit this evidence in the

district court.[3] Failure to object at trial precludes review by this court unless the unpreserved error is plain error. Saletta v. State, 127 Nev. ___, ___, 254 P.3d 111, 114 (2011). "'An error is plain if the error is so unmistakable that it reveals itself by a casual inspection of the record.'" Id. (quoting Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (internal quotation marks omitted)). A review of K.G.'s and S.G.'s testimony does not unmistakably reveal plain error. Thus, we decline to consider Caron's arguments regarding the admission of this evidence.

Caron next argues that the district court erred by allowing the State to question K.K. about whether Caron's inappropriate conduct with her happened 20 times. Caron does not specifically assert how he was unfairly prejudiced by this testimony, nor does he argue that the jury's verdict would have differed in the absence of that question. See Ledbetter, 122 Nev. at 259, 129 P.3d at 677. As such, it was not manifest error for the district court to allow the State's question.

Caron argues that the testimony from Dr. Kathleen Milbeck, a defense psychologist expert, on the theory of grooming was inadmissible bad act evidence. Prior to trial, the district court conducted a hearing, and determined that Dr. Milbeck could testify as to the overall theory of grooming, but prohibited any testimony regarding whether Caron had groomed, or attempted to groom, the child victims. At trial, Dr. Milbeck

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[3]Caron objected to the State's motion to admit this prior bad acts evidence on the grounds that it was inconsistent with the written police reports provided by K.G. and S.G. He does not mention K.G.'s testimony regarding her assault by another individual in his objection, nor does he argue that S.G.'s testimony concerned incidents that occurred in Carson City and not Lyon County.

testified only as to the overall theory of grooming. We conclude that the general theory of grooming does not constitute prior bad act evidence.

Finally, Caron argues that the jailhouse informant's testimony was inadmissible prejudicial bad act evidence because the testimony concerned alleged sexual assaults of the child victims by other men in Caron's presence. However, after conducting an evidentiary hearing, the district court found this testimony was relevant to prove intent and lack of mistake, and the danger of unfair prejudice did not substantially outweigh the probative value of the testimony. We conclude that the district court did not manifestly err in admitting this testimony. Additionally, even if this was impermissible bad act evidence, we conclude that any error in admitting it would have been harmless given the State's overwhelming evidence against Caron. See King v. State, 116 Nev. 349, 355, 998 P.2d 1172, 1175-76 (2000) (declining to reverse based on the admissibility of prior bad act evidence and concluding that "the result would have been the same had the district court not admitted the testimony because [the defendant's] guilt [was] supported by overwhelming evidence").

The State did not change its theory of prosecution after the close of its case

Caron argues that the State changed its theory of the prosecution after the close of its case in violation of his Sixth Amendment right to notice and his due process rights as he was not informed that the State would present evidence of alleged incidents that occurred outside of Lyon County. He also argues that the State had the burden to prove venue beyond a reasonable doubt, and that proper venue must be determined by the jury rather than the district court.[4] We disagree.

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[4]Caron also argues that venue was improper because the only conduct that occurred in Lyon County in some of the counts charged was

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This court applies a de novo standard of review to constitutional challenges. See Davidson v. State, 124 Nev. 892, 192 P.3d 1185 (2008). Caron asserts that the charging documents only charged him with offenses that occurred in Lyon County, and not with offenses that began in Lyon County and ended in a different county, or that began in a different county and ended in Lyon County. However, the State never changed its theory that all of the offenses occurred in Lyon County. Thus, we conclude that the State did not impermissibly change its theory of prosecution in the case so as to violate Caron's rights. See NRS 173.095(1) ("The court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.").

With regard to Caron's argument that the State had a burden to prove venue beyond a reasonable doubt, this court has held that while "[i]t is the duty of the prosecutor to prove venue[,] . . . [v]enue may be established by circumstantial evidence and need not be shown beyond a reasonable doubt." Dixon v. State, 83 Nev. 120, 122, 424 P.2d 100, 101 (1967). Caron urges this court to overturn its prior jurisprudence and hold that venue must be proven beyond a reasonable doubt. We decline to do so. See James v. State, 105 Nev. 873, 875-76, 784 P.2d 965, 967 (1989) (addressing a similar argument and explaining that "[a]lthough . . . a majority of states require that venue be proved beyond a reasonable doubt,

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his driving through the county. We conclude that this argument lacks merit. See NRS 171.040(2) ("When an offense committed in this state . . . [o]n a private motor vehicle, prosecuting its trip, the venue is in any county through which the . . . private motor vehicle[ ] passes in the course of its trip . . . .").

we believe that any change in the level of proof currently required would more appropriately be made by the [L]egislature"). Therefore, we conclude that the State need not prove venue beyond a reasonable doubt. Furthermore, even if we were to conclude otherwise, the State met the burden in this case. The record demonstrates that the parties briefed the issues of jurisdiction and venue in the district court, and the State provided sufficient evidence showing that each count occurred in Lyon County.

Although Caron argues that venue must be determined by a jury, this court has held that "[v]enue determinations are committed to the sound discretion of the trial judge and will remain undisturbed on appeal absent a clear demonstration of an abuse of discretion." Ford v. State, 102 Nev. 126, 130, 717 P.2d 27, 29 (1986). After a careful review of the evidence, the district court found that there was sufficient circumstantial evidence to support a finding that venue was proper in Lyon County. We conclude that Caron has failed to demonstrate how the district court's finding was a clear abuse of its discretion.

The district court did not err by rejecting several of Caron's proffered jury instructions

Caron argues that the district court erred by rejecting his proposed language for the jury instructions regarding informant and child witness testimony. We disagree.

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). This court applies de novo review to issues of law, including whether a jury instruction is the correct statement of the law. Nay v. State, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007).

On appeal, Caron argues that the district court should have used the specific phrase "jailhouse informant" in jury instruction no. 22 regarding informant testimony to prompt the jury to scrutinize the testimony. However, this court has held that "[i]t is not error for a court to refuse an instruction when the law in that instruction is adequately covered by another instruction given to the jury." Rose v. State, 123 Nev. 194, 205, 163 P.3d 408, 415 (2007) (internal quotations omitted). Here, jury instruction no. 22 instructed the jury on how to determine the "degree of credit due to an in-custody informant," and that "[i]f you believe that an in-custody informant has lied about any material fact in the case, you may disregard the entire testimony of that witness, or any portion of his or her testimony which is not proved by other evidence." We determine that an "in-custody informant" is not materially different from a "jailhouse informant," nor does this instruction fail to caution the jury to scrutinize the testimony. We thus perceive no abuse of discretion or judicial error.

Caron next argues that the district court erred when it refused to instruct the jury on child witness testimony in sexual assault cases. Caron bases his argument on LaPierre v. State, in which this court held that "the victim must testify with some particularity regarding the incident," and that "there must be some reliable indicia that the number of acts charged actually occurred." 108 Nev. 528, 531, 836 P.2d 56, 58 (1992). As discussed above, the children in this case sufficiently testified about the events for which Caron was charged as indicated in LaPierre. See id. Moreover, in Rose, the defendant proposed an instruction virtually identical to the one Caron sought in this case, and this court concluded that there was no abuse of discretion or judicial error because the defendant's proposed instruction was "sufficiently covered by other jury

instructions regarding the State's burden of proof and the reasonable doubt standard." 123 Nev. at 205, 163 P.3d at 415-16. Here, the jury was also properly instructed on the State's burden of proof and the reasonable doubt standard. Therefore, we conclude that the district court did not abuse its discretion or commit judicial error by denying Caron's proposed instruction.

The sentence imposed did not constitute cruel and unusual punishment

Caron finally argues that his sentence constitutes cruel and unusual punishment, in violation of the Eighth Amendment. He argues that his sentence of 14 consecutive life sentences is disproportionate to the crimes committed. We disagree.

This court has consistently afforded the district court wide discretion in its sentencing decision and will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). Therefore, "[r]egardless of its severity, a sentence that is 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.'" Chavez v. State, 125 Nev. 328, 348, 213 P.3d 476, 489 (2009) (quoting Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996).

Here, Caron does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant statutes are unconstitutional. Further, the imposed sentence for his conviction of the 10 counts of sexual assault with a child under 14 years of age and 4 counts of lewdness with a child under 14 years of age fits within the mandatory

sentencing scheme under NRS 200.366 and NRS 201.230(2). His sentence is not so unreasonably disproportionate to the charged offenses as to shock the conscience. We conclude that the sentence imposed does not constitute cruel and unusual punishment.

Having considered Caron's contentions and concluded that they do not warrant reversal, we

ORDER the judgment of the district court AFFIRMED.

Saitta, J.

Pickering, J.

Hardesty, J.

cc: Hon. Leon Aberasturi, District Judge
Karla K. Butko
Attorney General/Carson City
Lyon County District Attorney
Lyon County Clerk