IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA LOCKWOOD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59529

FILED

DEC 13 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING PART, REVERSING IN PART, AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of three counts of sexual assault of a child under the age of fourteen years and one count of lewdness with a child under the age of fourteen years. Third Judicial District Court, Lyon County; David A. Huff, Judge.

First, Appellant Joshua Lockwood argues that his conviction for lewdness violates double jeopardy because it was dismissed by the district court at his first trial for insufficient evidence. The State claims that the count was dismissed as redundant and could be charged again on retrial without implicating double jeopardy. While it is unclear from the district court's explanation at the first trial exactly why it dismissed the charge, the State admitted during a hearing prior to Lockwood's second trial that the count was dismissed because the victim had not testified to any lewd acts. Upon a review of the victim's testimony at the first trial, we conclude that the district court dismissed the lewdness count because the victim failed to testify to an independent act of lewdness. Accordingly, we conclude that Lockwood's lewdness conviction violates double jeopardy, see Davidson v. State, 124 Nev. 892, 897, 192 P.3d 1185, 1189 (2008), and we reverse his conviction for lewdness.

Second, Lockwood argues that the district court erred in admitting into evidence a recorded conversation he had with a detective because it contained the detective's hearsay declarations that he believed the victim to be truthful, as well as his unqualified commentary on the medical evidence. "We review a district court's decision to admit or exclude evidence for an abuse of discretion." Mclellan v. State, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008). The detective's statements are not hearsay because they were not offered for the truth of the matter asserted, NRS 51.035, and were necessary to give context to Lockwood's statements. See U.S. v. Valerio, 441 F.3d 837, 844 (9th Cir. 2006). Further, while it is inappropriate for a detective to vouch for a complaining witness' credibility, we conclude that the district court did not abuse its discretion in admitting the statements because it issued a limiting instruction explaining that they were not to be considered in evaluating credibility. See McConnell v. State, 120 Nev. 1043, 1062, 102 P.3d 606, 619 (2004) (presuming that jurors follow the instructions they are given).

Third, Lockwood argues that the district court erred in admitting a medical examination report because it contained inadmissible hearsay statements of both the medical examiner and the victim's mother and included prior consistent statements of the victim. Because the victim, her mother, and the medical examiner testified at trial and were available for cross-examination, any error in admitting the report was harmless. See id.; see also Vega v. State, 126 Nev. ___, ___, 236 P.3d 632, 638 (2010) (holding that an erroneously admitted medical examiner's report that contained the examiner's questions, the victim's answers depicting the victim's medical history and history of sexual abuse, and the

examiner's observations and findings, was merely duplicative of other testimony and was not prejudicial).

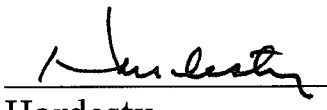
Fourth, Lockwood argues that the district court implicitly commented on the strength of the State's case by telling jurors that they would probably want to complete their deliberations in one night to avoid driving back the next day. We conclude that the district court sufficiently remedied any implied prejudice when it apprised the jury that it could take as long as necessary to reach a verdict and could come back the next day. See State v. Bardmess, 54 Nev. 84, 92-93, 7 P.2d 817, 819 (1932). The district court also issued an appropriate instruction to the jury that it was not to infer any bias from statements made by the district court, and we presume that the jurors followed that instruction. See McConnell, 120 Nev. at 1062, 102 P.3d at 619.

Based upon the foregoing reasons, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

Saitta, J.

Pickering, J.



Hardesty, J.

cc: Third Judicial District Court
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Attorney General/Carson City
Lyon County District Attorney
Lyon County Clerk