IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD LEE TIFFANY, SR.,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36146

FILED

SEP 10 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of five counts of lewdness with a child under the age of 14 years, two counts of sexual assault of a child, and one count of attempted sexual assault. On appeal, Edward Lee Tiffany, Sr., contends that the district court below committed numerous errors, including: (1) admitting cumulative and prejudicial hearsay statements by the child victim, H.G.; (2) determining that Tiffany did not have the right to invoke his spousal privilege pursuant to NRS 49.295; and (3) denying Tiffany's motion for continuance. Tiffany additionally contends that there was insufficient evidence presented to sustain his conviction. We conclude that none of Tiffany's arguments have merit.

Tiffany first contends that the district court abused its discretion in admitting H.G.'s numerous hearsay statements, including the testimony from the victim's mother and the two videotaped interviews by police officers, when H.G. herself was available to testify. Tiffany argues that the admitted testimony was cumulative and allowed the State to present the same testimony over and over, thereby prejudicing Tiffany.[1] We disagree.

[1]Tiffany also suggests that the district court erroneously permitted the statements to be admitted before

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Although the admission of prior consistent statements is generally disfavored unless the witness's credibility is at issue, we recognized in Felix v. State[2] that such testimony may be permitted in child sexual assault cases "to ensure that a [child sexual abuse] victim's accusations are fully and accurately recounted" and the "surrounding facts and circumstances" are fully presented.[3] But we also held that "once the child's [sexual assault] accusations have been fairly presented by one or more witnesses as to the time, the place, and the incident and any challenges to the victim's credibility are fairly met, additional hearsay allegations should be restricted" because the additional testimony is often cumulative, amounts to witness vouching, or is more prejudicial than probative.[4]

In this case, we conclude that the district court did not abuse its discretion in admitting the additional hearsay testimony. First, because H.G.'s actual testimony on direct examination was fairly brief, the admitted hearsay statements helped ensure a full and accurate account of the events. Second, because the videotaped interviews did not each cover all of the instances of abuse, the hearsay testimony is not as cumulative as Tiffany contends and really

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H.G. testified. But NRS 51.385 and the subsequent case law do not require the child victim to testify first. Thus, we conclude that the timing of the testimony was not per se error.

[2]109 Nev. 151, 200, 849 P.2d 220, 253 (1993).

[3]See also NRS 51.385 (permitting statements made by a child under the age of ten to others describing acts of sexual conduct to be admissible provided that: (1) the district court holds an evidentiary hearing outside of the jury's presence; (2) the district court makes findings as to the trustworthiness of the statements; and (3) the child either testifies or is unavailable to testify).

[4]Felix, 109 Nev. at 200-01, 849 P.2d at 253.

consisted of only two repetitions of H.G.'s testimony: the victim's mother's testimony and the combination of the two videotaped interviews.[5] Third, the witness vouching concern is diminished in this case because the two videotaped interviews showed H.G. herself reciting the incident, not another adult recounting what she said. Therefore, the only adult witness repeating H.G.'s testimony was the victim's mother, who only briefly recounted some of the facts to which H.G. testified. Finally, H.G.'s statement to her mother and on the videotapes revealed some inconsistencies in H.G.'s trial testimony that Tiffany used in his cross-examination of H.G. and in closing, thus indicating that the additional testimony was probative of H.G.'s credibility and not prejudicial to Tiffany. Accordingly, we conclude that the district court was not manifestly wrong in admitting H.G.'s hearsay statements into evidence.[6]

Tiffany next contends that the district court erred in finding that Tiffany did not have the right to invoke his spousal privilege pursuant to NRS 43.295 and thereby prevent his wife Lurlene from testifying against him. We disagree. NRS 43.295 is inapplicable where the spouse invoking the privilege has been charged with a crime against "a child in the custody or control of either" spouse. Tiffany argues that the he was not in "control" of H.G. at the time of the crimes because he was not acting as a "guardian" or "baby sitter" with some form of "legal authority" over her at those times.

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[5]We note that Tiffany himself was responsible for repeating H.G.'s videotaped statements during his cross-examination of the interviewing officers.

[6]See Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985) ("The determination of whether to admit evidence is within the sound discretion of the district court, and that determination will not be disturbed unless manifestly wrong.").

In Meador v. State[7], however, we held that a defendant's "physical control" over the victim satisfied the requirements of the exception to the privilege. In so holding, we impliedly recognized that the societal interest in protecting children trumps the societal interest in protecting the sanctity of the marital union -- the underlying purpose of the spousal privilege. Accordingly, we are not persuaded that Meador is distinguishable from Tiffany's case and hold that the district court correctly concluded that the marital privilege was not available to Tiffany.

Tiffany also argues that the district court abused its discretion in denying Tiffany's last minute motion for continuance so that he could replace his public defender with private counsel. We disagree. While we are sensitive to the importance of Tiffany's right to choose counsel[8] and to the fact that "promptness and efficiency must not be sought at the expense of fairness,"[9] the trial court in this case reached the reasonable conclusion that the public's interest in the efficient administration of justice outweighed Tiffany's right to choose his own counsel because: (1) the jury and witnesses were ready for trial; (2) Tiffany could have tried to secure the funding from his family much earlier; and (3) Tiffany had no specific complaint about his appointed counsel aside from being "uncomfortable" with them. Accordingly, we hold that the district court did not abuse its discretion in denying Tiffany's motion for continuance.[10]

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[7]101 Nev. 765, 768, 711 P.2d 852, 854 (1985).

[8]Powell v. Alabama, 287 U.S. 45, 53 (1932).

[9]Sierra Nevada Stagelines v. Rossi, 111 Nev. 360, 364, 892 P.2d 592, 595 (1995).

[10]Wesley v. State, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996) ("The decision to grant or deny trial continuances is within the sound discretion of the district court and will not

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Tiffany finally contends that there was insufficient evidence presented at trial to sustain his conviction on the five counts of lewdness. We disagree. We have previously held that the uncorroborated testimony of the victim, without more, is sufficient to uphold a sexual assault or rape conviction.[11] In this case, H.G. herself testified to each of the counts. Additionally, the State presented other evidence of Tiffany's guilt, including: (1) H.G.'s sister's testimony that she once saw Tiffany simulating intercourse with H.G.; (2) The victim's mother's testimony that when she confronted Tiffany, he stated "I'm sorry;" (3) Lurlene's testimony that Tiffany told her that he had done something wrong to H.G. and that he was ashamed, wanted forgiveness, and could not tell her the details because she would not want anything to do with him. After viewing the evidence in the light most favorable to the prosecution, we conclude that "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," and therefore that sufficient evidence was presented to sustain Tiffany's conviction.[12]

Having concluded that none of Tiffany's argument have merit, we

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be disturbed absent a clear abuse of discretion."); Morris v. Slappy, 461 U.S. 1, 11-12 (1982) ("[O]nly an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel) (quoting Ungar v. Sarafite, 376 U.S. 575, 589 (1964)).

[11]Hutchins v. State, 110 Nev. 103, 107-08, 867 P.2d 1136, 1139 (1994); May v. State, 89 Nev. 277, 279, 510 P.2d 1368, 1369 (1973).

[12]Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (reciting the relevant standard of review); see also Hern v. State, 97 Nev. 529, 531, 635 P.2d 278, 279 (1981) (stating that "the jury must be given the right to make logical inferences which flow from the evidence").

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Agosti

cc: Hon. Connie J. Steinheimer, District Judge
Attorney General
Washoe County District Attorney
Washoe County Public Defender
Washoe County Clerk

ROSE, J., dissenting:

Prior consistent statements of a witness are generally inadmissible.[1] We reiterated this rule in the context of a child sexual assault case in Felix v. State,[2] where we held that once the child's accusations have been fairly presented, "additional hearsay allegations should be restricted". The gist of our holding was that prior consistent statements by an alleged child victim should be received sparingly, and only to make sure the full story of the critical events of the alleged assault are told.

The prosecutor in this case disregarded this direction and, before calling the alleged child victim to testify, called several witnesses to testify to the child's hearsay statements about the assaults. These included the victim's mother and two police officers who showed videotapes of the victim reciting portions of the events of the charged crimes. By the time the child victim testified, all critical facts of the assaults had been placed in evidence by hearsay testimony at least twice. When the child victim testified, the critical events were told a third time.

The majority observes that the testimony of the child victim was brief, although she did testify to all the facts to support the charges against Tiffany. But this should come as no surprise, the events had all been described before by hearsay testimony.

To follow the guidance of Felix, a prosecutor should rely primarily on the testimony of the child victim and use

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[1]See Patterson v. State, 111 Nev. 1525, 1531-32, 907 P.2d 988, 988-89 (1995); NRS 51.035(2)(b).

[2]109 Nev. 151, 200, 849 P.2d 220, 253 (1993).

hearsay statements only to supply information the child could not remember or to clarify the facts. By calling witnesses to testify to a child's hearsay statement before the child's testimony, it is difficult for a district judge to determine whether the facts testified to are necessary to fully and accurately recount the facts of the assault. By the same token, a prosecutor who calls his witnesses in this order should bear the consequences when it is found that the hearsay statements admitted were unnecessary and largely repetitive of the child victim's testimony.

No witness should have his or her testimony repeated three or four times unless an unusual situation is involved. In this case, there was no such unusual situation and the directives of Felix were ignored. Because I believe the repeated admission of the child victim's hearsay statements was prejudicial, I would reverse Tiffany's convictions and remand for a new trial.

Rose, J.