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Summary of Gaxiola v. State, 121 Nev. Adv. Op. 64

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CRIMINAL LAW – SEXUAL ASSAULT

Summary

An appeal from a judgment of conviction, entered after jury verdict, on five counts of sexual assault of a minor under the age of fourteen years and two counts of lewdness with a child under the age of fourteen years.

Disposition/Outcome

Affirmed in part and reversed in part. The Nevada Supreme Court affirmed the convictions for sexual assault and reversed the lewdness convictions. The Court concluded that (1) the admission of the child victim's statement under NRS §51.385 did not violate the confrontation clause to the United States Constitution when the child-victim testified at trial; (2) the noncorroboration jury instructions were proper; (3) one of the lewdness charges violated the corpus delicti rule; and (4) there was some prosecutorial misconduct, however, it did not rise to a level of plain error requiring a reversal.

Factual and Procedural History

Jose Gaxiola ("Gaxiola"), twenty-one at the time of the assaults, was convicted of sexually assaulting a seven-year old child related to him. In the summer of 2001, the child was to spend a week at his relative's home in which two adults and another minor child ("E.G.") resided.

The child, nine at the time of trial, testified that Gaxiola sexually assaulted him. The child testified that he and the other minor child were asleep in another room when Gaxiola came in and got him. The other child did not wake up. According to the child, Gaxiola told him it was a game and promised him that he could play video games in the morning. The child went with Gaxiola to his bedroom where Gaxiola closed the door.

The child testified that Gaxiola made him perform fellatio on him. Gaxiola then made the child lie down on his side where Gaxiola anally penetrated the child. The child testified that the anal penetration occurred twice but was not certain as to whether both incidents occurred that night. After anally penetrating the child, Gaxiola put his penis in the child's mouth. Further, the child stated that he thought Gaxiola touched the child's penis with his hand but was unable to give any specifics of when and how this occurred in relation to the other sexual activities.

The E.G. and Gaxiola conveyed a very different story about what happened on the night in question. E.G. stated she did not sleep at all that night and the child-victim left the room only to use the bathroom. She further testified that when the child-victim did not return from the bathroom, she went to check on him and found him lying on the bed next to Gaxiola asking to play video games. E.G. stated that when Gaxiola did not let the child-victim play, he became upset and she took the child-victim back to her room.

¹ By Debra L. Pieruschka

Gaxiola claimed he called the child's mother the next day to pick the child up because the child said something gross or nasty the night before and Gaxiola did not want him in the house. The child's mother denied Gaxiola ever called her. In fact, she said it was not until the next day when she went to the house with her sister to drop some clothes off that her son came out of the house and told her he did not want to stay there any more.

In August 2001, while the child was staying at his aunt's house, he told his cousins that he had sex with Gaxiola. The cousins told their uncle about the child's comment. The uncle had a talk with the child regarding his comment to his cousins. The child became very emotional and told his uncle about what happened to him at Gaxiola's house. When the uncle asked the child if he told anyone about what happened, the child said no because Gaxiola told him he would go to the devil. The uncle told the child's mother about his conversation with the child and she questioned the child. The mother testified that the child told her "Gaxiola put his penis in the child's mouth, put the child's penis in his mouth, and anally penetrated the child."² The child's mother notified the police.

The child-victim was examined by a board certified pediatric and family nurse practitioner who tested that the child's injuries were consistent with the child's allegations of sexual assault and that abuse was probable. The police also interviewed the child-victim who related the same story that he had told his uncle, his mother, and the nurse practitioner.

Gaxiola consented to be interviewed by the police. During the interview Gaxiola told the police the child "frequently exhibited inappropriate sexual behavior."³ Gaxiola told the police the only sexual contact between himself and the child was when the child tried to touch his penis through his pants. Gaxiola said he told the child to stop and informed the child's mother who only laughed. However, after the interview had gone on for some time, Gaxiola changed his story. Gaxiola stated that the child came into his room on the night in question while he was sleeping. The child removed Gaxiola's penis from his boxers, touched it, and put it in his mouth. Gaxiola then stated that while he was sleeping the child laid in front of him and put Gaxiola's penis in the child's anus. When asked by the detectives how he became aroused to enable such an act, Gaxiola said, "all guys get hard when they sleep."⁴ Gaxiola said no other incidents of anal penetration occurred. However, Gaxiola said he woke up when he felt the child attempt to put his penis in Gaxiola's mouth and stopped the child. Gaxiola was arrested a month and half later and charged with seven counts - five counts of sexual assault and two counts of lewdness.

At the beginning of the trial, the State informed the district court that it planned to have the child's mother and uncle testify to the statements the child made to them. The district court conditioned the admissibility of their testimony on the child testifying at trial.

At trial, Gaxiola stated he never touched the child and testified that he told a different story to the police because he wanted to go home and the police were intimidating him. Gaxiola said he was able to provide details that were consistent with the child's story because the child's mother told him the details.

² Gaxiola v. State, 121 Nev. Adv. Op. 64.

³ *Id.*

⁴ *Id.*

Gaxiola was found guilty on all counts.

Discussion

Constitutionality of NRS §51.385

Gaxiola's first argument was his right to confrontation under the Sixth Amendment of the United States Constitution and the United States Supreme Court decision in *Crawford v. Washington*⁵ were violated when the district court admitted testimony about the child-victim's statements to his mother, his uncle, nurse practitioner, and the police detective.

The Court disagreed that the statements were barred. The Court reasoned that NRS 51.385 under the facts of this case does not violate the Confrontation Clause. The United States Supreme Court, in *Crawford*, held that extrajudicial testimonial statements by a witness are barred under the confrontation clause unless the defendant had a prior opportunity to cross-examine the witness.⁶ The Supreme Court noted that the Confrontation Clause does not bar the admission of a statement so long as the "declarant is present at trial to defend or explain it."⁷ Here, the child-victim testified at the trial and was subject to cross-examination.

Gaxiola next argues that because he did not have a prior opportunity to cross-examine the child under *People v. Price*⁸ it violates the Confrontation Clause; therefore, the extrajudicial statements are inadmissible. The Court found this argument without merit because *Price* dealt with an unavailable declarant. Here, the child was available for trial, testified and was available for cross-examination.

The Court held the statute allowing for admission of child-victim's statements to his mother and uncle regarding acts of sexual abuse by defendant did not violate the Confrontation Clause.

Jury Instruction

Gaxiola argues that the district court's jury instruction was erroneous. The jury instruction read as follows:

There is no requirement that the testimony of a victim of sexual offenses be corroborated, and his testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty.⁹

Gaxiola argues the jury instruction is problematic for three (3) reasons. First, it unfairly focuses the jury's attention on and highlights a single witnesses' testimony like a "Lord Hale"¹⁰

⁵ 541 U.S. 36 (2004).

⁶ *Id.* at 68.

⁷ *Id.* at 60 n.9.

⁸ 15 Cal. Rptr. 3d 299 (Ct. App. 2004).

⁹ *Gaxiola*, 121 Nev. Adv. Op. at 11.

¹⁰ *Turner v. State*, 111 Nev. 403, 403-04, 892 P.2d 579, 579 (1995). The "Lord Hale" instruction provided:

A charge such as that made against the defendant in this case is one, which, generally speaking, is easily made, and once made, difficult to disprove even if the defendant is innocent. From the nature of a case

instruction. Second, presents a “concept that is used in appellate review that is irrelevant to a jury’s function as fact-finder.”¹¹ Lastly, the technical meaning of “uncorroborated” inferred by the instruction is misleading and confusing because it has several alternative definitions.

The state asserts that appellate review is precluded because Gaxiola did not object to the jury instruction at trial. Further, that any error with the jury instruction was not plain at the time the jury instruction was given and reversal is not appropriate.

The Court has “repeatedly stated that the uncorroborated testimony of a victim, without more, is sufficient to uphold a rape conviction”¹² and has upheld jury instructions to that effect. The Court further concluded the instruction is significantly different from a “Lord Hale” instruction. The Court in *Turner v. State*¹³ held a “Lord Hale” instruction amounts to a commentary on the evidence, by telling a jury that a category of witness testimony should be given greater scrutiny.¹⁴ A “no corroboration” instruction simply informs the jury that corroboration is not required by law and does not tell the jury to give a victim’s testimony greater weight.

Gaxiola asserts the Court approved the combined use of “Lord Hale” instruction and two “no corroboration” instructions in *May v. State*.¹⁵ The Court disagreed, stating the Court in “*May* only states that the instructions concerning corroboration correctly state the law and that it was not an error to give them to the jury.”¹⁶ The Court stated *May* did not “suggest that the use of a combined jury instruction is required or approved of in sexual assault cases.”¹⁷

Here, the Court concluded that the district court did not err by giving the “no corroboration” instruction because the instruction was a correct statement of Nevada law. Additionally, the instruction does not unduly focus the jury’s attention on the victim’s testimony. “Therefore, it is appropriate for the district court to instruct the jurors that it is sufficient to base their decision on the alleged victim’s uncorroborated testimony as long as the testimony establishes all of the material elements of the crime.”¹⁸

Corpus Delicti Rule

Next, Gaxiola argues that the conviction on count seven of lewdness violates the corpus delicti rule because the only evidence supporting the charge was Gaxiola’s statement to the police that was recanted at trial.

such as this, the complaining witness and the defendant are usually the only witnesses. Therefore, the prosecuting witness['] testimony should be examined with caution.

Id.

¹¹ *Gaxiola*, 121 Nev. Adv. Op. at 11.

¹² *Id.* at 12.

¹³ 111 Nev. 403, 892 P.2d 579 (1995).

¹⁴ *Gaxiola*, 121 Nev. Adv. Op. at 13.

¹⁵ 89 Nev. 277, 278-79, 510 P.2d 1368, 1369 (1973), overruled by *Turner*, 111 Nev. at 404, 892 P.2d at 580.

¹⁶ *Gaxiola*, 121 Nev. Adv. Op. at 14-15.

¹⁷ *Id.* at 15.

¹⁸ *Id.*

The standard for the reviewing court 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.”¹⁹ “The jury determines the weight and credibility to give conflicting testimony.”²⁰ The corpus delicti of a crime must be proven independently of the defendant’s extrajudicial admissions.²¹

“The independent proof may be circumstantial evidence . . . , and it need not be beyond a reasonable doubt. A slight or prima facie showing, permitting the reasonable inference that a crime was committed, is sufficient. If the independent proof meets this threshold requirement, the accused’s admissions may then be considered to strengthen the case on all issues.”²²

Here, Gaxiola told the police the child would come up to him and touch his penis through his underwear but Gaxiola recanted this statement at trial. The child-victim did not testify Gaxiola made him touch Gaxiola’s penis. No other witnesses testified that the child said Gaxiola made him touch Gaxiola’s penis. Therefore, there is no evidence, outside of Gaxiola’s statement to the police that the act occurred. The Court held Gaxiola’s conviction on count seven violates the corpus delicti rule and reversed the conviction.

Redundant Convictions

Gaxiola next argues the lewdness convictions should be reversed since the conduct was a prelude to the sexual assault. Because the Court reversed count seven as violating the corpus delicti rule, the Court does not address whether the conviction was redundant.

The State asserted that the charges for sexual assault and lewdness could be maintained even when they occur in a single encounter except when the lewdness was incidental to the sexual assault. Separate and distinct acts of sexual assault may be charged as separate counts thereby resulting in separate convictions even though it is the result of a single encounter and all occurred within a relatively short time. However, the crimes of sexual assault and lewdness are mutually exclusive and when the convictions are both based upon a single act cannot stand.²³

The State contends that because of the child-victim’s age it is impossible to exact the precise timing and sequence of events “nevertheless, the child-victim testified to repeated acts of abuse.”²⁴ The Court found that it was “impossible to determine whether the lewdness was incidental to the sexual assault because the child did not testify regarding the sequence of events.”²⁵ It cannot be determined from the child’s testimony whether the touch was a separate and distinct act as in *Wright v. State*²⁶ and *Townsend v. State*²⁷ or a continuous act merged with a

¹⁹ *Id.* citing *Mason v. State*, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002).

²⁰ *Deeds v. State*, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981).

²¹ *Gaxiola*, 121 Nev. Adv. Op. at 16.

²² *Doyle v. State*, 112 Nev. 879, 892, 921 P.2d 901, 910 (1996), *overruled on other grounds by Kaczmarek v. State*, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004).

²³ *Braunstein v. State*, 118 Nev. 68, 79, 40 P.3d 413, 421 (2002).

²⁴ *Gaxiola*, 121 Nev. Adv. Op. at 17.

²⁵ *Id.* at 19.

²⁶ 106 Nev. 647, 799 P.2d 548, (1990) (affirming both convictions for attempted sexual assault and sexual assault despite the short time period between the acts).

sexual assault as in *Crowley v. State*²⁸ and *Ebeling v. State*.²⁹ The Court further reasoned that under NRS §201.230 Nevada's lewdness statute defines lewdness as "any lewd or lascivious act, other than acts constituting the crime of sexual assault."³⁰ The State has the burden at trial to show that the lewdness was not incidental to the sexual assault. Here the Court found the State failed to present any evidence regarding the sequence of events and under what circumstances the lewdness occurred. The State failed to prove Gaxiola's lewdness conviction for touching the child's penis is not redundant to the sexual assault conviction. Thus, the lewdness conviction must be vacated.

Prosecutorial Misconduct

Gaxiola next alleges several incidents of prosecutorial misconduct. The Court specifically addressed only two in their review of the case. The Court evaluated these allegations under the plain error rule because Gaxiola failed to object to the alleged incidents at trial. Under the plain error rule:

This court has long held that, as a general rule, the failure to make timely objections [to prosecutorial misconduct] and to seek corrective instructions during trial [precludes appellate consideration]. But we may consider sua sponte plain error which affects the defendant's substantial rights, if the error either: (1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings.

The level of misconduct necessary to reverse a conviction depends upon how strong and convincing is the evidence of guilt. If the issue of guilt or innocence is close, if the state's case is not strong, prosecutor misconduct will probably be considered prejudicial.³¹

The first issue asserted by Gaxiola is whether it is improper to ask one witness if another witness was lying. At the time of Gaxiola's trial and after the trial concluded the Court adopted a rule "prohibiting prosecutors from asking a defendant whether other witnesses have lied or from goading a defendant to accuse other witnesses of lying, except where the defendant during direct examination has directly challenged the truthfulness of those witnesses."³² The Court held that while the prosecutor improperly asked the witness if another witness was lying, the prosecutor did not act with wrongful intent and the error did not affect Gaxiola's substantial rights.

²⁷ 103 Nev. 113, 734 P.2d 705 (1987) (affirmed separate convictions for fondling a victim's breasts and digitally penetrating the victim's vagina because the defendant stopped fondling the child's breasts before proceeding to further separate acts).

²⁸ 120 Nev. 30, 83 P.3d 282 (2004) (reversing a conviction for lewdness explaining unlike *Wright* and *Townsend* the defendant never interrupted his actions).

²⁹ 792 P.2d 643 (Cal. 1990) (reversing a conviction for lewdness after determining the touching of the defendant's penis on the victim's buttocks was incidental to the sexual assault by anal penetration).

³⁰ NEV. REV. STAT. § 201.230 (2004).

³¹ *Rowland v. State*, 118 Nev. 31, 38, 39 P.3d 114, 118-19 (2002) (internal quotations and citations omitted).

³² *Daniel v. State*, 119 Nev. 498, 519, 78 P.3d 890, 904 (2003).

Gaxiola next alleges that the prosecutor committed misconduct by asking questions about his post-arrest silence. During the trial, the prosecutor attempted to use Gaxiola's interview statements to impeach his trial testimony in which Gaxiola testified he lied during the police interview but was now telling the truth on the stand. The prosecutor posed two questions to Gaxiola that have been brought into question. First, the prosecutor asked Gaxiola why he did not recant during the month and a half after the interview and before his arrest. Then the prosecutor asked whether he told the police after his arrest that he made up the story.

The prosecution is forbidden at trial to comment upon an accused's election to remain silent following his arrest and after he has been advised of his rights. In *Doyle v. Ohio*,³³ a prosecutor violated a defendant's right to remain silent by cross-examining the defendant as to why he did not tell the police upon being arrested that he had been set up. The Supreme Court stated *Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. The legal standard applied when determining whether to reverse a conviction under these facts is whether the state's comments on post-arrest silence were not harmless beyond a reasonable doubt. However, comments on post-arrest silence are not harmless in cases resting solely on the defendant's word versus the victim's word.³⁴

Here, the Court held the prosecutor's question regarding Gaxiola's failure to recant his interview *after* arrest was an improper comment on post-arrest silence. The Court reasoned Gaxiola, after being arrested, had the right to remain silent and not talk to the police about his case. Nevertheless, the Court held the question regarding why he did not recant his story during the month and a half after the police interview but *before* his arrest is permissible. The Court finding the fact that Gaxiola had plenty of time to correct his statement prior to trial was already before the jury and the case was not based solely on the victim's word. Therefore, the Court concluded that the misconduct did not constitute plain error because it did not affect Gaxiola's substantial rights.

Concurrence/Dissent

Concurred in the result reached by the majority but disagreed that Gaxiola's failures to recant his false statements to police before and after his arrest violated his Fifth Amendment right to remain silent. Therefore, it was unnecessary to engage in a harmless error analysis on that issue.

Conclusion

The court concluded that: (1) the admission of a child-victim's statements to third parties pursuant to NRS §51.385 does not violate the Confrontation Clause when the child-victim testifies at trial; (2) there was no requirement that the testimony of the child-victim be corroborated and therefore, the no-corroboration instruction was not improper; (3) one of the lewdness convictions violates the corpus delicti rule when the conviction was based on Gaxiola's recanted confession; (4) the remaining lewdness conviction was a redundant conviction for sexual assault; and (5) while some prosecutorial misconduct occurred, it did not rise to the level of plain error warranting reversal.

³³ 426 U.S. 610 (1976).

³⁴ *Anderson v. Charles*, 447 U.S. 404, 408 (1980).