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Morrison v. State of Nevada, 140 Nev. Adv. Op. 24 (Apr. 4, 2024)

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UNDER NRS 200.710(1), THE STATE MUST PROVE BEYOND A REASONABLE DOUBT, THAT THE DEFENDANT KNEW, OR HAD REASON TO KNOW, THAT THE VICTIM WAS A MINOR—UNDER THE AGE OF 18—AT THE TIME OF THE CRIME. IF FOUND GUILTY, THE DEFENDANT SHALL BE “PUNISHED” AS PROVIDED IN NRS 200.750. THE STATE DOES NOT NEED TO PROVE THIS STANDARD WHEN DETERMINING THE APPROPRIATE PENALTY AT SENTENCING UNDER NRS 200.750.

Summary

Kwame De-Markquise Morrison raised five issues after a jury found him guilty of three counts of sexual assault upon a minor under the age of 14 years and one count of use of a minor under the age of 14 to produce pornography. Morrison contended that the district court erred when it instructed the jury that lack of knowledge, or mistake of fact as to the victim’s age, is not a defense to the charge of use of a minor in producing pornography, NRS 200.710(1). Second, Morrison alleged that the district court abused its discretion by denying his motion to dismiss counsel. Third, he alleged that the district court erred by failing to conduct a *Faretta* canvass. Fourth, he argued that the State committed prosecutorial misconduct. Fifth, Morrison contended the State improperly commented on the evidence during the closing argument. The Nevada Court of Appeals found that the district court provided an inaccurate jury instruction to the jury regarding NRS 200.710(1); nevertheless, the error was harmless beyond a reasonable doubt. The Court rejected Morrison’s other four arguments and found that the district court did not abuse its discretion.

Background

In 2016, 21-year-old Kwame De-Markquise Morrison initiated a sexual relationship with A.M., who was only 12 years old at the time. In June 2017, A.M. discovered that she was pregnant and disclosed the relationship to her mother who filed a police report identifying Morrison. In October 2017, A.M. gave birth shortly after turning 13 years old. During two recorded interviews conducted by Las Vegas Metropolitan Police Department (LVMPD), Morrison admitted he had sex with A.M. two to three times but stated that he believed A.M. was 16 years old. Morrison’s Facebook records were subpoenaed revealing sexually explicit pictures of A.M. sent to Morrison at his request. DNA evidence was also collected from Morrison, A.M., and A.M.’s child, confirming that Morrison was the child’s father.

Subsequently, Morrison was charged by indictment with six counts of sexual assault upon a minor under 14 years of age and one count of use of a minor under the age of 14 in producing pornography. Three days before the calendar call, Morrison’s motion to dismiss his appointed counsel and request new counsel were denied. Morrison initially indicated that he might be interested in representing himself at trial, but he subsequently told the court that he did not want to be canvassed to represent himself. At no point thereafter did Morrison raise any additional concerns about counsel, nor did he renew his request to represent himself.

During jury instructions, the State proposed providing that a defendant’s lack of knowledge or mistake as to the victim’s age is not a defense to *either* of the charged crimes

¹ By Toree Robinson.

Morrison objected to its application to the pornography charge. Over his objection, the district court included the State’s proposed jury instruction for all charges.

The jury found Morrison guilty of three counts of sexual assault upon a minor under the age of 14 years of age and one count of use of a minor under the age of 14 to produce pornography. The district court sentenced Morrison to life imprisonment with the possibility of parole after 35 years for each sexual assault conviction and life with the possibility of parole after 10 years for using a minor under 14 to produce pornography, with all sentences to run concurrently. Morrison timely appealed.

Discussion

Although the district court provided an inaccurate jury instruction, the error was harmless beyond a reasonable doubt

Morrison alleged that the district court provided an inaccurate jury instruction thus committing reversible error.

The lack of knowledge of the age, or a reasonable mistake as to the age, of a child victim of sexual assault of a minor under the age of 14 and use of a minor under the age of 14 in producing pornography is not a defense to the crimes of sexual assault of a minor under the age of 14 in producing pornography.

To determine whether this jury instruction was an accurate statement of the law, the Court reviewed it de novo.² When interpreting a statute, the Court also will “interpret clear and unambiguous statutory language by its plain meaning unless doing so would lead to an unreasonable or absurd result.”³

Morrison was charged under NRS 200.710(1) which states that “[a] person who knowingly uses, encourages, entices or permits a minor to simulate or engage in or assist others to simulate or engage in sexual conduct to produce a performance is guilty of a category A felony and shall be punished...”⁴ A “minor” in this statute is defined as an individual under the age of 18.⁵ Morrison contends that the word “knowingly” in NRS 200.710(1) requires the State to prove that Morrison knew or had reason to know that A.M. was a minor at the time of the crime. The Nevada Court of Appeals agreed.

In *Garcia*, the Nevada Supreme Court held that when there is an intent requirement in a statute, to sustain a conviction “that intent must be proven as to each element of the crime.”⁶ In *Flores-Figueroa*, the United States Supreme Court reached a similar conclusion and held that “whe[n] a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence.”⁷ For example, if a child is said to have “knowingly” taken his sibling’s

² *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007).

³ *Moore v. State*, 136 Nev. 620, 622–23, 475 P.3d 33, 36 (2020).

⁴ NEV. REV. STAT. 200.710(1).

⁵ *State v. Hughes*, 127 Nev. 626, 628–29, 261 P.3d 1067, 1069 (2011).

⁶ *Garcia v. Sixth Jud. Dist. Ct.*, 117 Nev. 697, 701, 30 P.3d 1110, 1112 (2001).

⁷ *Flores-Figueroa v. United States*, 556 U.S. 646 (2009).

toy, it is assumed that the child knows that he is taking something, and that what he is taking is a toy and that the toy belongs to his sibling.⁸

The Court applies this reasoning to the plain language of NRS 200.710(1) and concludes that the word “knowingly” applies to each element of the crime of use of a minor in the production of pornography, including the transitive verbs (“uses, encourages, entices, or permits”) and the verbs’ object (“a minor). Therefore, the State must prove beyond a reasonable doubt that the defendant knew or had reason to know that the victim was a minor—under the age of 18—at the time of the crime.

The State argued that the term “knowingly” should be interpreted like the term “willfully” to require only general intent because NRS 200.710(1) was intended to protect children from sexual abuse; however, the Court rejected the State’s arguments. Unlike the crime of use of a minor in the production of pornography, the crimes of statutory sexual seduction and lewdness do not contain an express knowledge requirement. Moreover, to interpret the word “knowingly” as imposing only a general intent requirement would conflict with the term’s statutory definition.⁹

In this case, the State was required to prove beyond a reasonable doubt that Morrison knew or had reason to know that A.M. was a minor under the age of 18 to impose criminal liability under NRS 200.710(1). The State was *not* required to prove that Morrison knew or should have known that A.M. was, in fact, under the age of 14 for the purposes of determining the appropriate penalty at sentencing under NRS 200.750. NRS 200.750 lists the two possible penalties for a violation of NRS 200.710(1) depending on whether: the minor is “14 years of age or older” or “less than 14 years of age.”¹⁰

Although the State was not required to prove that Morrison knew or had reason to know that A.M. was under the age of 14 to impose the sentence set forth in NRS 200.750, the Court concluded that the jury instruction given was inaccurate. It incorrectly instructed the jury that the State did not need to prove that Morrison knew or had reason to know that A.M. was a minor under the age of 18 to establish criminal liability under NRS 200.710(1).

Overwhelming evidence indicated that Morrison knew A.M. was a minor. For example, in a recorded interview admitted by stipulation, Morrison stated he believed A.M. was 16 years old at the time of their sexual relationship. The Court ultimately concluded that the jury’s verdict was not due to the inaccurate jury instruction, therefore, the error was harmless beyond a reasonable doubt.

The district court did not abuse its discretion by denying Morrison’s motion to dismiss counsel

Morrison argued that the district court abused its discretion by denying his motion to dismiss counsel because the court failed to adequately inquire about his ineffective assistance claim as required by *Young v. State*.¹¹ The Court reviewed the district court’s decision for an abuse of discretion with the consideration of three factors: “(1) the extent of the conflict between

⁸ *Id.* at 651.

⁹ See *Williams v. State*, Dep’t of Corr., 133 Nev. 594, 596, 402 P.3d 1260 (2017) (“This court ‘avoid[s] statutory interpretation that renders language meaningless or superfluous.’” (quoting *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011))).

¹⁰ NEV. REV. STAT. 200.750.

¹¹ *Young v. State*, 120 Nev. 963, 102 P.3d 572 (2004).

the defendant and counsel, (2) the adequacy of the [district] court's inquiry into the defendant's complaint, and (3) the timeliness of the motion and the extent of any inconvenience or delay.¹²

As to the first factor, Morrison failed to establish an irreconcilable conflict with his appointed counsel. He claimed that counsel failed to communicate with him, but then acknowledged they had attended two settlement conferences together. Therefore, Morrison's allegations failed to demonstrate a significant breakdown in his relationship with appointed counsel that would warrant substitution.¹³ Secondly, Morrison failed to demonstrate that the district court's inquiry was inadequate. As a resolution to the communication issue alleged by Morrison, he accepted his counsel's assurance of future communication and never renewed his request to dismiss counsel. Finally, Morrison's request was approximately one week prior to trial to which Morrison conceded on appeal that his motion was "admittedly quite untimely." The Court ultimately held that the district court did not abuse its discretion by denying Morrison's motion to dismiss counsel.

The district court did not err by failing to conduct a Faretta canvass

Morrison asserted that the district court abused its discretion when it failed to perform a *Faretta* canvass after he requested to represent himself. He initially requested to be canvassed; however, he withdrew his request after his counsel's assurance of future communication. Morrison is not entitled to relief on this claim because he withdrew his request for self-representation, therefore, he invited any alleged error in this regard.

The State did not commit prosecutorial misconduct

Morrison contended that the State committed prosecutorial misconduct by knowingly allowing A.M. to provide false testimony, and that the State had a duty "to correct" this testimony on cross-examination of A.M. During trial, Morrison did not object, so the Court reviewed his claim for plain error.¹⁴ Prosecutorial misconduct is considered plain error if the error either "(1) had a prejudicial impact on the verdict when viewed in the context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings."¹⁵ In *Hanley*, the Court held that a conviction is constitutionally infirm "[i]f the state knows that its witness has testified falsely on a point relevant to the credibility of that witness, and fails to correct that falsehood."¹⁶

In this case, Morrison did not cite any evidence in the record that showed that A.M. testified falsely, that the State *knew* of any alleged falsehoods, or that the State knowingly elicited false testimony from A.M. Moreover, Morrison asserted that the State had records that contradicted A.M.'s testimony; however, he failed to provide the court with such. Therefore, Morrison failed to establish prosecutorial misconduct, let alone a plain error.

The State did not improperly comment on the evidence during closing argument

¹² *Id.* at 965. *Id.* at 574.

¹³ *Cf. id.* at 969, 102 P.3d at 576 (finding a "significant breakdown" in the attorney-client relationship that warranted substitution of counsel where defendant complained about counsel to the court on five separate occasions and counsel violated a court directive to visit the defendant in jail).

¹⁴ *See Rose v. State*, 123 Nev. 194, 208–09, 163 P.3d 408, 418 (2007) (providing that plain error review applies when the appellant failed to object to alleged prosecutorial misconduct).

¹⁵ *Id.*

¹⁶ *Hanley v. Sheriff of Clark Cty.*, 85 Nev. 615, 617, 460 P.2d 162, 163 (citing *Napue v. Illinois*, 360 U.S. 264 (1969)).

Morrison argued that the district court erred in overruling his objection to the State's comment during closing argument that Morrison should have known that A.M. was not age 16 or older at the time of the offenses because he attended high school with A.M.'s older brother. He alleged that the comment was based on inadmissible hearsay because the statement was made during a recorded interview with Detective Salkoff that he stipulated to admit into evidence. The district court overruled the objection because Morrison's "acquiescence" in response to Detective Salkoff's statement effectively adopted it thus finding it admissible.

Morrison forfeited any claim that Detective Salkoff's statements during that interview were inadmissible hearsay because he stipulated to admit the video recording of the interview and did not object when it was played for the jury.¹⁷ "The State is free to comment on testimony, to express its views on what the evidence shows, and to ask the jury to draw reasonable inferences from the evidence."¹⁸ Therefore, Morrison is not entitled to relief.

Conclusion

The district court erred when it incorrectly instructed the jury that a lack of knowledge or a reasonable mistake as to the age of a child victim is not a defense to the crime of use of a minor under the age of 14 in producing pornography. The State need only to prove beyond a reasonable doubt that Morrison knew or had reason to know that A.M. was a minor under the age of 18 for the jury to convict him under NRS 200.710(1). The State did not need to prove that Morrison knew or had reason to know that A.M. was under the age of 14 to impose a sentence under NRS 200.750(2).

The district court's incorrect jury instruction was a harmless error beyond a reasonable doubt because Morrison admitted to the police that he believed A.M. was 16 years old during their sexual relationship. Therefore, finding no other errors, the judgment of conviction was affirmed.

¹⁷ See *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018) ("The failure to preserve an error, even an error that has been deemed structural, forfeits the right to assert it on appeal.").

¹⁸ *Randolph v. State*, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001).