

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COPY

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

No. 33,697

OSCAR ARVIZO,

Defendant-Appellant.

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

JUN 30 2015

Monte R. Pelt

REPLY BRIEF

Oral Argument is requested pursuant to Rule 12-213(C)

Direct appeal taken from the Second Judicial District Court
Bernalillo County, New Mexico
The Honorable Briana Zamora, Presiding

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Statement of Compliance

This pleading was prepared using Microsoft Word, version 2002. The body of this brief is not fifteen pages in length. It was printed in Times New Roman, a proportionally-spaced typeface. Undersigned counsel certifies that it complies with Rule 12-213 NMRA.

Oral Argument Requested

Oral Argument is requested. Oral argument will assist the court in ascertaining the factual and legal underpinnings of the defendant/appellant's appeal.

ARGUMENT

I. Mr. Arvizo's objections regarding the excluded evidence.

Mr. Arvizo objected to both the trial court's application of the rape shield and to the violation of his constitutional rights to confrontation. [BIC 15-16] [AB 10-14] This Court should first determine if the rape shield law was correctly applied before addressing the constitutional confrontation question. *Schlieter v. Carlos*, 1989-NMSC-037, ¶ 13, 108 N.M. 507 (*citations omitted*) ("It is an enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so.")

With reference to whether or not A.B. had knowledge that Mr. Arvizo witnessed her and D.B. engage in oral sex, this was precisely the kind of question that warranted confrontation. The mere fact that A.B. denied knowledge, just like her denial that the oral sex even took place, was insufficient to deny the jury an opportunity to judge her credibility on the matters.

Furthermore, the jury could infer A.B.'s knowledge even absent any explicit testimony that she had such knowledge. New Mexico case law routinely allows knowledge to be inferred. *See State v. Montoya*, 1966-NMSC-224, ¶ 10, 77 N.M. 129 (recognizing that because knowledge "is personal in its nature and may not be susceptible of proof by direct evidence[,] it may "be inferred from occurrences and circumstances.") Such an inference was for the jury to make.

II. Mr. Arvizo’s statutory construction argument was sufficiently developed.

The defense respectfully disagrees that a single sentence was “the full extent of Defendant’s discussion of statutory construction.” [AB 19] While the brief-in-chief did not again use the phrase “statutory construction,” it did spend the next several pages of the brief citing the statutes and discussing the meanings of specific terms in the statutes. [AB 25-28] That is the epitome of statutory construction argument, even absent periodic explicit references to that phrase.

The arguments about sufficiency are intertwined with the arguments about statutory constructions because the statutes establish what must be proven in order to be sufficient for a conviction. *See State v. Maldonado*, 2005-NMCA-072, ¶ 9,137 N.M. 699, *citing State v. Barragan*, 2001-NMCA-086, ¶ 22, 131 N.M. 281 (recognizing that review of the sufficiency of the evidence supporting a conviction may require a court to engage in statutory construction in determining whether evidence viewed in the light most favorable to the State constituted the charged offense).

III. There was insufficient evidence to establish that Mr. Arvizo was a “person in position of authority” or that he “coerced” the alleged victim.

State v. Gipson (cited as *State v. Gibson* in the answer brief [AB 3]) is distinguishable from the case at hand. 2009-NMCA-053, 146 N.M. 202. In *Gipson*

the court of appeals found that “[Victim] testified that she thought of Defendant as a father figure, and when other people were around, Defendant acted as a father figure.” *Id.*, 21. The victim’s mother also testified that she entrusted the defendant to act as the victim’s guardian when she (the mother) was not around. *Id.*, 22. The defendant in that case also took the victim to work with him, and the victim sometimes spent the night at his house. *Id.*, 23. The court of appeals, citing the defendant’s role in her life and the absence of her biological father, ultimately found that “[Defendant] was considered by [victim] to be a father figure, he acted as a father figure when other people were around, and he was entrusted by Nicole's mother to act as her guardian at times.” *Id.*, 24.

Contrast that with the current case, where the alleged victim testified that Mr. Arvizo was not like a father figure to her, where she did not accompany him to work or spend nights in his house, and where her mother did not testify that Mr. Arvizo was entrusted as her guardian. **[BIC 27]** Mr. Arvizo’s case is more like that found in *State v. Segura*, where “[victim] twice within moments forcibly resisted sexual contact by pulling her hands back from Defendant’s grip. She then left the room.” 2002-NMCA-044, ¶ 15, 132 N.M. 114. In that case this Court found that “No evidence exists that [victim] was at all actually unduly influenced to submit to any sexual contact.” **Id.**

With reference to evidence of coercion, the State cites *State v. Gardner*, 2003-NMCA-107, ¶ 38, 134 N.M. 294. *Gardner* in turn cited *State v. Trevino*, 1991-NMCA-085, 113 N.M. 804, 807. In *Trevino* this Court pointed out that the defendant in that case was an employer who had “sole supervisory control not only over the premises but also over the victim.” *Id.* ¶ 5. The defendant had also used that supervisory authority to assign the defendant to a “small ticket booth where all of the incidents of sexual contact took place.” *Id.* In Mr. Arvizo’s case there was no evidence that Mr. Arvizo had supervisory control, let alone sole supervisory control, over A.B. while her parents were in the house. In addition, there was no evidence that Mr. Arvizo assigned or took any part in deciding where A.B. walked or slept in the house. *Trevino* warns that “This is not to say that the position of employer in and of itself necessarily establishes the use of that position as coercion....” *Trevino*, 1991-NMCA-085, ¶ 6. Similarly, in Mr. Arvizo’s case the position of relative did not in and of itself establish the use of that position as coercion.

IV. There was insufficient evidence of bribing a witness.

The answer brief argues that the jury could infer that “Defendant intended to intimidate A.B.” [AB 26, emphasis added] Similarly it points out that A.B. was “freaked out.” [AB 26] As the brief-in-chief pointed out, however, an objective standard should be used. [BIC 29]

The State also cites Mr. Arivizo's "cool demeanor" and "nonchalant manner" of asking the single question of A.B. as evidence of intimidation. [AB 26] This tends to imply the State does not think that there is any way to ask a question without being intimidating. If he had a "hot demeanor" or "excited manner" no doubt that would be said to be intimidating. The expansiveness of the State's interpretation of intimidation robs it of meaning.

V. Dr. Ornelas improperly vouched.

Mr. Arvizo asks this court to follow the persuasive authority of the State of Iowa. Its Supreme Court has recently held that:

To allow an expert witness to testify a child's physical manifestations or symptoms are consistent with sexual abuse trauma or CSAAS [child sexual abuse accommodation syndrome] allows the expert witness to indirectly vouch that the victim was telling the truth because the expert opines the symptoms are consistent with child abuse. To put it another way, the expert is saying these symptoms mean the child suffered a sexual abuse trauma; therefore, the child must be telling the truth when he or she relates his or her story to the jury. It is the jury's function to determine if the victim is telling the truth, not the expert witness's. Accordingly, the expert witness's testimony crossed the line when she testified B.O.'s physical manifestations or symptoms were consistent with sexual abuse trauma or CSAAS. *State v. Dudley*, 856 N.W.2d 668, 677-678 (Iowa S. Ct. December 5, 2014).

While *Dudley* specifically dealt with physical manifestations consistent with "sexual abuse trauma or CSAAS" the same reasoning applies to physical manifestations (or lack thereof) consistent with abuse itself.

Importantly, *Dudley* pointed out that commenting on credibility can be done either directly or indirectly, and that both are impermissible. “Moreover, when an expert comments, directly or indirectly, on a witness's credibility, the expert is giving his or her scientific certainty stamp of approval on the testimony even though an expert cannot accurately opine when a witness is telling the truth. In our system of justice, it is the jury's function to determine the credibility of a witness. An abuse of discretion occurs when a court allows such testimony.” *Dudley*, 856 N.W.2d 668, 677.

As the *Dudley* case points out, “Many other courts have held opinions that a child victim’s behavior or symptoms are ‘consistent with’ child abuse are inadmissible.” *Dudley*, 856 N.W.2d 668, 682 (Justices Waterman and Zager, specially concurring) (collecting cases). Other States, however, have come out on the other side of this question. *See In re Butts*, 157 N.C.App. 609, 617-18, 583 S.E.2d 279 (N.C. Ct. App. May 20, 2003) (“However, our appellate courts have generally upheld the admission of testimony from a medical expert in a sexual abuse case that her observations are “consistent with sexual abuse.”)

VI. Authority was cited regarding Mr. Arvizo’s sentencing by a different judge.

The answer brief argued that the brief-in-chief “failed to provide authority supporting his request for resentencing or a record establishing the reasons behind

Judge Sanchez's recusal." [AB 38] The brief-in-chief cited persuasive authority from another state, as well as a prior New Mexico case that had relied on that out-of-state case. [BIC 37-38]

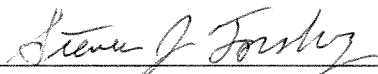
VII. On all other issues Mr. Arvizo stands on his brief-in-chief.

CONCLUSION

WHEREFORE Mr. Arvizo prays the Court reverse and remand for the reason set forth above and in the brief-in-chief.

Respectfully submitted,

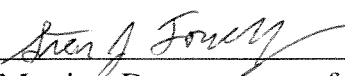
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief was served to the Attorney General's this 27 day of June, 2015.



New Mexico Department of the Public Defender