

IN THE SUPREME COURT OF THE STATE OF NEVADA

JIHAD THAIFF-ALLAH MONSOUR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48800

FILED

MAY 30 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER AFFIRMING IN PART, VACATING IN PART AND
REMANDING

This is an appeal from a judgment of conviction, upon a jury verdict, of one count of sexual assault with a deadly weapon, one count of sexual assault, and one count of assault with a deadly weapon. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge. The district court sentenced appellant Jihad ThaiFF-Allah Monsour to life with parole eligibility in ten years plus a consecutive life with parole eligibility in ten years for the sexual assault with a deadly weapon charge, plus a consecutive life with parole eligibility in ten years for the sexual assault charge, plus a consecutive twenty-eight to seventy-two months for the assault with a deadly weapon charge.

Monsour's arguments are two-fold. First, Monsour argues that evidentiary errors and prosecutorial misconduct warrant reversal of his convictions. In addition, Monsour argues that he was denied due process at sentencing. While we conclude that some of his arguments for reversal merit discussion, they do not rise to the level requiring reversal. However, we conclude that Monsour's argument for a new sentencing is persuasive because some of the district court's comments during the hearing were inappropriate and violated Monsour's due process rights. Accordingly, we reverse Monsour's sentence and remand with instructions

for further proceedings consistent with this order. The parties are acquainted with the facts, and we recount them only as necessary for our decision.

Monsour's challenge to the guilty verdict

Monsour argues that the district court committed multiple evidentiary errors during his trial which warrant reversal of his convictions.¹ The following three assignments of error merit discussion: 1) admission of uncharged misconduct evidenced in a letter written to Monsour's mother, 2) admission of prior theft testimony without benefit of a Petrocelli hearing, and 3) admission of evidence regarding the presence of the victim's four-year old son during the sexual assault.

Admission of uncharged misconduct

Monsour contends that the district court committed reversible error when it admitted into evidence a letter he wrote to his mother, while in custody, and testimony regarding prior theft from the victim's purse. He argues that these were evidence of uncharged misconduct and therefore inadmissible. We disagree and address each in turn. This court

¹In addition, Monsour argues that the district court erred when it admitted evidence of his prior bad act of stabbing his brother and giving a jury instruction regarding reasonable doubt that lessened the state's burden of proof. He also contends that the State committed prosecutorial misconduct by introducing other prior bad act evidence without requesting a Petrocelli hearing, introducing irrelevant and prejudicial evidence, making a "golden rule" argument during closing argument, and making improper arguments during sentencing. Finally, Monsour argues that the doctrine of cumulative error requires this court reverse his convictions. We disagree. We have considered Monsour's arguments regarding his convictions and find them to be without merit.

reviews a district court's decision to admit evidence for an abuse of discretion and will not reverse absent manifest error.²

Monsour's letter to his mother was properly admitted

Monsour argues that a letter to his mother which suggested that he solicited false testimony and threatened the victim should not have been admitted as improper and highly prejudicial evidence of other bad acts.³ We disagree.

NRS 51.035(3) makes a defendant's own statement admissible.⁴ However, the evidence must be relevant and the probative value must not be "substantially outweighed by the danger of unfair prejudice."⁵ Here, the district court, after a hearing outside the presence of the jury, determined that if the letter could be authenticated, the State could "use it for whatever you use it for." We conclude that the district court did not abuse its discretion.⁶ The letter was relevant because it contained Monsour's own assertions regarding his whereabouts on the date of the assault, which directly contradicted his previous statement to

²Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006).

³See NRS 48.045(2).

⁴NRS 51.045(1) defines statement as "an oral or written assertion."

⁵See NRS 48.025; NRS 48.035(1); see also Elvik v. State, 114 Nev. 883, 896-97, 965 P.2d 281, 289-90 (1998) (analyzing a defendant's own statements for relevance and undue prejudice).

⁶We note that the district court's statement admitting the evidence was very broad, but did not amount to reversible error. See Sengel v. IGT, 116 Nev. 565, 570, 2 P.3d 258, 261 (2000) (stating that this court will affirm a district court decision if it reaches the correct decision, even if for the wrong reason).

the police, and also contained Monsour's assertions regarding the victim's possible testimony. Finally, the district court admitted only a redacted copy of the letter, which was authenticated by the victim, and made its decision after full argument by counsel. We also conclude that the letter's probative value was not substantially outweighed by any prejudicial effect. Accordingly, reversal is not warranted on this ground.

Admission of prior theft testimony without a Petrocelli hearing

Monsour argues that his conviction should be reversed because the district court erred when it admitted the victim's testimony that he had previously stolen items from her purse without first conducting a hearing outside the presence of the jury to determine the admissibility of the prior bad acts pursuant to NRS 48.045(2).⁷ He argues that the evidence was irrelevant to the crimes charged and highly prejudicial.⁸

While the district court should have held a Petrocelli hearing prior to admitting the evidence, we will not consider such failure to constitute reversible error if the record provides evidence of admissibility or the result of the trial would have remained unchanged.⁹ We conclude that the district court's failure to conduct the Petrocelli hearing does not

⁷See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

⁸See Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997) (listing three factors for determining admissibility of uncharged acts: relevancy to the instant crime, clear and convincing proof, and risk of unfair prejudice cannot outweigh the probative value).

⁹King v. State, 116 Nev. 349, 354, 998 P.2d 1172, 1175 (2000).

compel reversal. The evidence was relevant to show force, an element of the crime of sexual assault, and to explain the victim's actions during the assault. The remaining factors for admissibility, set forth in Tinch v. State, are also sufficiently demonstrated in the record. Further, we conclude that the result would have been the same without the prior theft evidence because Monsour's guilt is supported by overwhelming evidence.¹⁰

Evidence that the victim's four-year-old son was present during the sexual assault

Monsour contends that his conviction should be reversed because the district court admitted, without objection, irrelevant and prejudicial evidence that the victim's four-year-old son was present during the sexual assault in the living room. We disagree.

Generally, failure to preserve claims by objecting during trial precludes appellate review.¹¹ However, "this court may address [the claims] for plain error or constitutional error sua sponte."¹² Under plain error review, this court examines whether an error occurred, whether it was plain, and whether it affected the defendant's rights.¹³ We conclude

¹⁰Monsour admitted in his statement to the police that he had digitally penetrated the victim and that he had broken the television and door. The jury heard the tape of the victim's 911 call and of Monsour's voluntary telephone interview. Further, the State presented photographic evidence supporting the victim's testimony that Monsour had choked her.

¹¹See Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997).

¹²Dzul v. State, 118 Nev. 681, 688, 56 P.3d 875, 880 (2002).

¹³Green v. State, 119 Nev. 542, 545, 80 P.3d 93,95 (2003).

that the testimony was relevant to show use of force and lack of consent, which are elements of the crime charged. Therefore, we conclude that the district court did not commit plain error by admitting this evidence.

Sentencing issues

Monsour argues that he is entitled to a new sentencing hearing because his right to a fair hearing at sentencing was violated based on the district court's comments before and during sentencing.¹⁴

The State contends that, because the district court heard argument regarding running the sentences concurrently rather than consecutively, the district court committed no error and Monsour's rights were not violated.¹⁵ We note that the sentence Monsour received was within the statutory limits and that while Monsour failed to preserve the issue of judicial misconduct for review, we consider this argument to address what we discern to be intemperate comments made by the judge.

First, while granting the State's motion to continue Monsour's sentencing hearing, the district court stated:

¹⁴Monsour also argues that the district court was unduly influenced at sentencing by improper remarks by the State. Because of our conclusion regarding sentencing we need not reach this issue. He further argues that imposing lifetime supervision violates double jeopardy principles and violates the Eighth Amendment prohibition against cruel and unusual punishment. We have considered these arguments and find them to be without merit.

¹⁵Citing Cameron v. State, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998) ("So long as a judge remains open-minded enough to refrain from finally deciding a case until all of the evidence has been presented, remarks made by the judge during the course of the proceedings will not be considered as indicative of disqualifying bias or prejudice.").

This was the most horrible sexual assault I have seen in the 16 years I have been on the bench. I'm going to do what I have to do. And I was going to do it this morning. Dog gone it.

Mr. Monsour, some time, some time, man, you will get it. Probably the only way you will get it is when I sentence you to life in prison.

Ultimately, at sentencing, the district court, while cautioning the victim about her feelings of revenge, stated that “[v]engeance is mine sayeth the Lord.”¹⁶ Notwithstanding the salutary attempt by the judge to bring closure to the victim, we find that the remarks indicate that the judge’s impartiality was compromised.

Generally, absent an abuse of discretion, this court will not interfere with the district court’s wide discretion in sentencing.¹⁷ However, “[t]he right to a fair trial incorporates the right to have a trial presided over by a judge who is free from bias or prejudice.”¹⁸ We review unobjected to judicial misconduct for plain error.¹⁹ “Plain error is error which . . . ‘seriously affects the integrity or public reputation of the judicial proceedings.’”²⁰ “A judge is presumed to be unbiased,”²¹ and the party

¹⁶Monsour also argues that this comment violated his rights under the Establishment Clause of the First Amendment. Because of our conclusion as to sentencing, we need not reach this issue.

¹⁷Randall v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993).

¹⁸Wesley v. State, 112 Nev. 503, 509, 916 P.2d 793, 798 (1996).

¹⁹Oade v. State, 114 Nev. 619, 621-22, 960 P.2d 336, 338 (1998).

²⁰Parodi v. Washoe Medical Ctr., 111 Nev. 365, 368, 892 P.2d 588, 590 (1995) (quoting Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)).

challenging the judge bears the burden to establish grounds for disqualification.²²

NCJC Canon 2A states that “[a] judge shall respect and comply with the law* and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

This court, in harmony with the NCJC, strives to promote public confidence in the judicial process by requiring utmost integrity and impartiality from the judges, in form and substance, including avoiding the appearance of impropriety.²³ This court applies an objective test for determining the reasonableness of questioning a judge’s impartiality, so that “whether a judge is actually impartial is not material.”²⁴ Additionally, this court, has concluded that “an opinion formed by a judge on the basis of facts introduced or events occurring in the course of the

... continued

²¹Millen v. Dist. Ct., 122 Nev. 1245, 1254, 148 P.3d 694, 701 (2006).

²² Walker v. State, 113 Nev. 853, 864, 944 P.2d 762, 769 (1997).

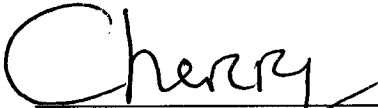

²³“The NCJC’s primary policy is ‘to promote public confidence in the judiciary.’” Millen, 122 Nev. at 1255, 148 P.3d at 701 (quoting Hogan v. Warden, 112 Nev. 553, 558, 916 P.2d 805, 808 (1996)); see NCJC Canon 2(A) cmt. (the test for the appearance of impropriety being “whether the conduct would create in reasonable minds, a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”); see also NCJC Canon 3(B)(9) and (10) cmt. (“restrictions on judicial speech are essential to the maintenance of the integrity, impartiality, and independence of the judiciary”).

²⁴ PETA v. Bobby Berolini, Ltd., 111 Nev. 431, 436, 894 P.2d 337, 340 (1995), overruled on other grounds by Towbin Dodge, LLC v. Dist. Ct., 121 Nev. 251, 260, 112 P.3d 1063, 1069-70 (2005).

current proceedings, or of prior proceedings, constitutes a basis for a bias or partiality motion where the opinion displays a 'deep-seated favoritism or antagonism that would make fair judgment impossible.'"²⁵

We conclude that the district court's conduct and comments could have "create[d] in reasonable minds, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence [was] impaired."²⁶ Thus, we conclude that the district court's comments denied Monsour due process in a fair and unbiased sentencing hearing. Therefore, we vacate Monsour's sentence and remand with instructions for the case to be randomly reassigned for sentencing before another district court. Accordingly we

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


_____, J.
Cherry

_____, J.
Saitta


²⁵Kirksey v. State, 112 Nev. 980, 1007, 923 P.2d 1102, 1119 (1996) (quoting Litkey v. United States, 510 U.S. at 555).

²⁶NCJC Canon 2(A) cmt. We note that the comments and conduct in question arose only after the jury verdict, not during the jury trial itself. Nothing in the district court's conduct of the jury trial indicates that it violated Monsour's due process rights as to his convictions, nor rises to the level of a violation of the Nevada Code of Judicial Conduct.

cc: Hon. Steven R. Kosach, District Judge
Thomas L. Qualls
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

MAUPIN, J., concurring:

I agree that we should affirm on the guilt phase issues and reverse for a new sentencing hearing before another district court judge. The district judge clearly lost his impartiality and should refrain in the future from engaging in the type of verbal histrionics that marked the sentencing hearing in this case. However, I agree with the statement in footnote 26 of the majority that his comments did not ascend to the level of a violation of the Nevada Code of Judicial Conduct.



Maupin