IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYSON TYLER LOKKEN, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 49147

FILED

JUN 04 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of sexual assault on a child and one count of lewdness with a child under the age of 14 years.[1] Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On March 5, 2007, Bryson Tyler Lokken was sentenced to serve two prison terms of life with parole eligibility after 20 years for the counts of sexual assault of a child, and a term of life with parole eligibility after 10 years for lewdness. The district judge ordered all the counts to run concurrently.

Lokken raises several issues on appeal. First, he contends that the district court erred in failing to sua sponte order a new trial due to conflicting evidence. A district court may order a new trial if required as a matter of law, if there is newly discovered evidence, or on "any other

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[1]Appellant was acquitted of one count of false imprisonment.

grounds."[2] "Nevada has empowered the trial court in a criminal case where the evidence of guilt is conflicting, to independently evaluate the evidence and order another trial if it does not agree with the jury's conclusion that the defendant has been proven guilty beyond a reasonable doubt."[3] At trial, defense counsel did not move for a new trial. Failure to raise an issue with the district court generally precludes appellate consideration of that issue.[4] This court may nevertheless address an assigned error if it was plain and affected the appellant's substantial rights.[5] "To be plain, an error must be so unmistakable that it is apparent from a casual inspection of the record."[6]

Inspection of the record does not reveal plain error. Lokken's assertions of conflicting evidence are based on the testimony of his relatives and close personal friends, who each testified briefly about either what they saw on the date of the sexual assault or what they had been told by the victim. This testimony differed from the victim's account as to details such as the victim's demeanor after the alleged assault, whether

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[2]NRS 176.515.

[3]State v. Purcell, 110 Nev. 1389, 1393, 887 P.2d 276, 278 (1994) (quoting Washington v. State, 98 Nev. 601, 604, 655 P.2d 531, 532 (1982)).

[4]Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997).

[5]NRS 178.602.

[6]Garner v. State, 116 Nev. 770, 783, 6 P.3d 1013, 1022 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

she conversed with anyone at the home where the assault took place, whether she was holding hands with Lokken as he walked her home, and whether she thought Lokken was attractive prior to the events in question. The testimony from Lokken's family and friends was intended to show that the victim had consented to having sexual relations with Lokken. When questioned by the police during the investigation, Lokken initially denied any wrong doing. Eventually, Lokken admitted to a variety of sexual conduct with the victim, including "forceful" sexual intercourse with her. Lokken was twenty years old and admitted that he knew the victim was only thirteen, but claimed the sex was consensual.

In contrast, the victim testified that Lokken had forcefully raped her. Forensic nurse examiner Denise Engel testified that the trauma to the victim's genitalia was more extensive than she had ever seen in a person five days after intercourse, consensual or not, and that the injuries were consistent with forced sexual assault. She testified that her findings led her to conclude that the injuries were the result of significant force. The district court was in a position to hear witness testimony and make an independent determination of witness credibility. The record does not support the contention that the district court erred in failing to sua sponte order a new trial. Nothing in the record precluded the district court from "agree[ing] with the jury's conclusion that the defendant ha[d] been proven guilty beyond a reasonable doubt."[7] Therefore, we conclude that Lokken's claim lacks merit.

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[7]Purcell, 110 Nev. at 1393, 887 P.2d at 278.

Second, Lokken contends that he was unfairly prejudiced when the State commented on his custodial status. Lokken's assertion is based on the following cross-examination of Sierra Teves:

> Q: And you talked to the defendant about this, right?
>
> A: Yes.
>
> Q: In fact, you visited him to talk to him in jail, right?
>
> A: No.

Lokken did not object. However, at the next recess, the district court stated that the question was improper and gave counsel time to consider raising any appropriate motion. The district court noted that it refrained from interrupting after the comment so as not to draw undue attention to the fact that the defendant might have been in custody. No further discussion of this issue occurred.

As stated above, failure to raise an objection with the district court generally precludes appellate consideration of an issue.[8] Therefore, we review this matter for plain error. The district court sua sponte raised the issue of the prosecution's improper reference and suggested that an admonishment was necessary and gave Lokken time to consider the matter. Lokken never requested an admonishment. He cannot now complain that failure to admonish the jury was reversible error. We conclude that Lokken has failed to demonstrate plain error and that no relief is warranted.

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[8]Rippo v. State, 113 Nev. at 1259, 946 P.2d at 1030.

Third, Lokken claims that the prosecutor committed misconduct by misstating the evidence and unfairly disparaging defense witnesses. Lokken points to the prosecutor's statement during closing argument that "[y]ou've heard that [the victim] and her family were harassed by his friends. She also had to undergo public humiliation as rumors circulated about her." Lokken also references the prosecutor's description of his home as "the house where the defendant has underaged kids in his bedroom without parental supervision apparently all the time." Lokken also argues that the prosecutor's description of defense witnesses as his "trash friends" was unfairly disparaging.

Defense counsel did not object to any of these statements. We therefore review these comments for plain error.[9] Under plain error review, we will find prosecutorial misconduct 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."[10] The test for determining whether prosecutorial misconduct deprived a defendant of a fair trial is "whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process."[11] A prosecutor may not argue facts or inferences not supported by the evidence, but is free to "argue inferences

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[9]NRS 178.602.

[10]Rose v. State, 123 Nev. 24, __, 163 P.3d 408, 418 (2007).

[11]Rudin v. State, 120 Nev. 121, 136-37, 86 P.3d 572, 582 (2004).

from the evidence and offer conclusions on contested issues."[12] We will address each of the allegedly improper statements in order.

Regarding the statement that Lokken's friends harassed the victim and her family, the victim's mother testified that Lokken and his friend Jacquelyn made phone calls to the victim's residence on separate occasions. The victim testified that she received "angry calls" and that Lokken called her a few days after the alleged sexual assault and taunted her with the fact that he had not worn a condom. We conclude that the prosecutor's statement was permissible based on the evidence presented at trial.

The State presented testimony that the neighbors heard about the victim's sexual assault allegations and that they talked about it both with each other and with Lokken and his family. Three people testified that they were friends with the victim until about the time the victim brought her rape allegation against Lokken. Two of them admitted they were now good friends with Lokken, and the other stated she and the victim were now "enemies." The victim was only 13 years old. There is sufficient evidence to permit an inference that rumors were circulated about the victim and she suffered "public humiliation."

The prosecutor's reference to the lack of supervision at Lokken's home was based on evidence presented at trial. In particular, Lokken's mother testified that she permitted her son to go into his

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[12]Miller v. State, 121 Nev. 92, 100, 110 P.3d 53, 58 (2005) (quoting Jones v. State, 113 Nev. 454, 467, 937 P.2d 55, 63 (1997)).

bedroom with underage friends because she had no reason to question anyone that came into her house. She stated that her son had "quite a few friends" that were underage. She stated that it did not bother her that her son went into his room and closed the door with someone who was underage because it was "nothing unusual."

The prosecution's description of defendant's "trash friends" was not specifically directed at defense witnesses, and must be considered in context.[13] The State used the term during closing argument:

> If she's so into him, if this is so wonderful and he's so nice and they're so happy together and this is a wonderful moment in her young life and his life, if she's so into him, then ladies and gentlemen, why isn't she walking with him to the store? Why is she hanging around with his trash friends?

We have held that it is improper to disparage defense counsel, defense tactics, or the defendant himself.[14] However, unflattering characterizations of a defendant will not provoke a reversal when such descriptions are supported by the evidence.[15] We conclude that the same standard applies where, as here, the prosecutor disparaged defense witnesses. The above description of Lokken's friends, particularly after several of them had testified at trial, was disparaging to the defendant and defense witnesses, and the State admits its error. But the State

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[13]Rudin, 120 Nev. at 136-37, 86 P.3d at 582.

[14]See Butler v. State, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004).

[15]Miller v. State, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005) (citing U.S. v. Tisdale, 817 F.2d 1552, 1555 (11th Cir. 1987)).

maintains that the comment "accurately described the witnesses' demeanor and appearance." The record does not include descriptions of the witnesses' appearance or demeanor, and therefore we are unable to determine the accuracy of the State's contention. However, the jurors were able to view testimony and determine for themselves whether the description was valid. We conclude that the prosecutor's comments in this regard did not rise to the level of plain error.

Fourth, Lokken complains that the phrase "more weighty affairs of life" in the reasonable doubt instruction is unconstitutional and lessens the State's burden. We have repeatedly held that the instruction codified at NRS 175.211 is constitutional and that we will defer to the legislature for changes to that instruction.[16] Therefore, we decline to revisit the issue here.

Finally, Lokken asserts that the cumulative effect of the claimed errors denied him a fair trial, requiring reversal. "If the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this court will reverse the conviction."[17] We conclude that, considering the substantial evidence presented against Lokken, any

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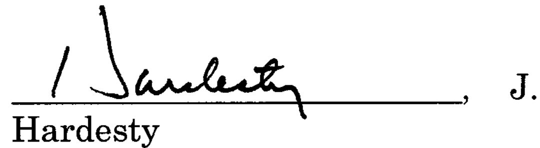
[16]See Garcia v. State, 121 Nev. 327, 345, 133 P.3d 836, 847 (2005); Bolin v. State, 114 Nev. 503, 530, 960 P.2d 784, 801 (1998), abrogated on other grounds by Richmond v. State, 118 Nev. 924, 59 P.3d 1249 (2002); Holmes v. State, 114 Nev. 1357, 1365-66, 972 P.2d 337, 342-43 (1998).

[17]Homick v. State, 112 Nev. 304, 316, 913 P.2d 1280, 1288 (2004) (citing Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

error committed at trial, considered either individually or cumulatively, does not warrant reversal of Lokken's convictions.[18]

Having considered Lokken's claims and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.[19]



_______________, J.
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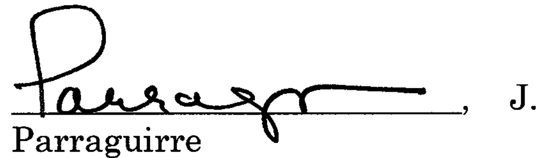

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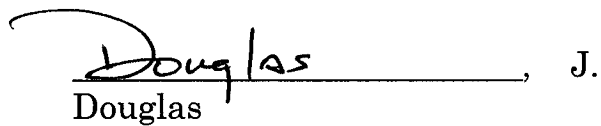

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Douglas

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[18]Id. (stating that a conviction will not be reversed so long as substantial evidence supports the conviction such that the verdict would have been the same in the absence of error).

[19]We note that there is a clerical error in the judgment of conviction. The judgment incorrectly states that appellant was convicted pursuant to a guilty plea. In fact, appellant was convicted pursuant to a jury verdict. Following this court's issuance of its remittitur, the district court shall correct this error in the judgment of conviction. See NRS 176.565 (providing that clerical error in judgments may be corrected at any time); Buffington v. State, 110 Nev. 124, 126, 868 P.2d 643, 644 (1994) (explaining that district court does not regain jurisdiction following an appeal until supreme court issues its remittitur).

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