

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID M. CHUTE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49882

FILED

APR 11 2008

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of lewdness with a child under the age of fourteen. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge. The district court sentenced appellant David M. Chute to a term of life in prison with the possibility of parole after ten years.

Chute argues that he is entitled to a new sentencing hearing on two bases. He first argues that, pursuant to Buschauer v. State,¹ the district court should have granted him a continuance when the State introduced a prior specific act during sentencing without providing the defense notice.

Chute argues that the district court improperly allowed the victim's mother to testify regarding an incident when Chute allegedly abused the witness when she was 12 or 13 years old. Due process requires that references to a prior specific act by the defendant made during victim impact testimony are admissible if: the accuser testifies under oath, and

¹Buschauer v. State, 106 Nev. 890, 804 P.2d 1046 (1990).

the defense is given reasonable notice of the prior bad act testimony and an opportunity to cross-examine the accuser.² Without reasonable notice to the defense that a prior specific act by the defendant will be discussed, the defense is “entitled to a continuance to rebut the impact statement, unless the court can disclaim any reliance on the prior acts in imposing sentence.”³

At sentencing, counsel objected to the mother’s testimony as irrelevant, but he did not object based upon lack of notice or ask for a continuance. Generally, the failure to object during the trial will preclude appellate review of that issue.⁴ However, this court may review for plain error affecting the defendant’s substantial rights.⁵ The burden rests with Chute to show actual prejudice or a miscarriage of justice.⁶ During the sentencing hearing, the victim discussed the harm she suffered from Chute’s actions, while the mother’s statement of past abuse was brief. In imposing the sentence, the district court did not discuss the statements by the mother, only the harm to the victim. Therefore, we conclude that Chute failed to demonstrate plain error.

²Id. at 894, 804 P.2d at 1048.

³Id.

⁴Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403 (2001) (citing Cordova v. State, 116 Nev. 664, 666 6 P.3d 481, 482 (2000)).

⁵Id. at 63, 17 P.3d at 403-04.

⁶Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

Second, Chute contends that the district court sentenced him for the uncharged sexual abuse he allegedly committed against the victim's mother. A district court has broad discretion in sentencing and may consider uncharged acts.⁷ The district court, however, may not punish the defendant for uncharged acts in addition to the offenses of which he was convicted.⁸

Here, the admission of the challenged testimony was relevant to Chute's character and thus appropriate for the district court's consideration in sentencing Chute.⁹ Moreover, Chute specifically acknowledged in the plea agreement that the district court could consider other charged or uncharged misconduct in sentencing him. Further, there is no indication that the district court punished Chute for the uncharged acts. The district court said during sentencing, "In this case there appears to be, as well, a substantial harm to the child." The district court made no mention of any consideration other than the harm to the victim. We discern nothing from the submissions before us suggesting that the

⁷Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996); see also Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976) (holding that a sentence will not be disturbed on appeal so long as it was not based solely on impalpable or highly suspect evidence.).

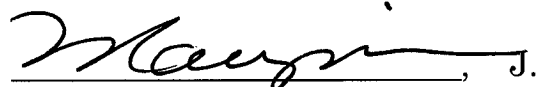
⁸Denson, 112 Nev. at 494, 915 P.2d at 287.

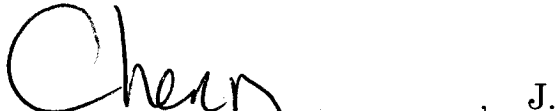
⁹Id. at 492, 915 P.2d at 286 (stating that "[p]ossession of the fullest information possible concerning a defendant's life and characteristics is essential to the sentencing judge's task of determining the type and extent of punishment").

district court abused its discretion in sentencing Chute as it did. Therefore, we conclude that Chute is not entitled to relief on this claim.

Having considered Chute's contentions and concluded that they are without merit, we

ORDER the judgment of the conviction AFFIRMED.


_____, J.
Maupin


_____, J.
Cherry


_____, J.
Saitta

cc: Hon. Steven P. Elliott, District Judge
Washoe County Public Defender
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk