IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES LAWRENCE FLEENER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37613

FILED

NOV 05 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of lewdness with a child under the age of fourteen years. The district court sentenced appellant to imprisonment for life with parole eligibility after ten years and to pay $25.00 in restitution and a $250.00 DNA analysis fee.

Appellant contends that the State breached the plea agreement at sentencing when the prosecutor argued that the Clark County District Attorney's Office believed that the statutory provisions permitting probation for the crime of lewdness with a minor[1] were the result of a mistake by the Legislature. Appellant specifically argues that because the statutory scheme allows for probation and his plea agreement contemplated that he could argue for probation, the prosecutor's argument violated the spirit of the plea agreement. We conclude that appellant's argument lacks merit.

The State specifically reserved in the plea agreement the right to argue at sentencing. Therefore, the prosecutor was free to argue for a sentence of imprisonment and against probation.[2] Moreover, although the prosecutor criticized the statutory scheme allowing for probation in cases involving lewdness with minors, he did not advocate ignoring valid statutes. Instead, the prosecutor admitted that probation was an option, but argued that a grant of probation would not be appropriate in light of

[1]See NRS 201.230; NRS 176A.100; NRS 176A.110.

[2]See Sullivan v. State, 115 Nev. 383, 388-89, 990 P.2d 1258, 1261 (1999).

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the serious nature of appellant's crime, the fact that it involved abuse of a position of trust, and the likelihood that appellant would pose a future danger to other children. We conclude that the prosecutor's argument did not breach the plea agreement.

Appellant also contends that he is entitled to a new sentencing hearing because the prosecutor engaged in misconduct by arguing that evidence outside the record showed the results of one psychosexual evaluation performed on appellant were suspect. Appellant notes Dr. John S. Pacult performed a psychosexual evaluation of appellant and determined that appellant presented "a moderate risk to reoffend sexually." At sentencing, the prosecutor argued over appellant's objection that Dr. Pacult made a similar determination regarding another unnamed person in an unrelated case and that person reoffended while awaiting sentencing. We conclude that appellant is not entitled to relief.

In general, factual matters outside the record are irrelevant and an improper basis to support a sentencing argument.[3] Therefore, we agree that the prosecutor's reference to the unrelated case was improper. However, we have held that in order for prosecutorial misconduct to constitute reversible error, it must be prejudicial and not merely harmless.[4] Further, we have repeatedly declined to interfere with a sentencing determination when the sentence is legal, within the statutory limits, and not supported solely by impalpable and highly suspect evidence.[5] We note that the sentence imposed here is legal and within the parameters provided by the relevant statute.[6] Nothing in the record indicates that the district court relied on the prosecutor's improper argument in determining the sentence. Rather, the record reflects that the district court was concerned that appellant's crime was serious in comparison to similar crimes in other cases; it involved a "disappointing

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[3]See Ybarra v. State, 103 Nev. 8, 15, 731 P.2d 353, 358 (1987) (citing Collier v. State, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985)).

[4]See Sherman v. State, 114 Nev. 998, 1010, 965 P.2d 903, 912 (1998).

[5]See Denson v. State, 112 Nev. 489, 493, 915 P.2d 284, 287 (1996); see also Cameron v. State, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998).

[6]See NRS 201.230.

and horrendous" breach of trust; it forever affected the lives of a number of young people; and, the weight of these factors was not sufficiently offset by appellant's willingness to seek counseling or admit his crimes. In sum, the sentencing determination is properly supported by reliable and admissible evidence. Thus, we conclude that the error is harmless.

Having considered appellant's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.[7]

Young, J.

Agosti, J.

Leavitt, J.

cc: Hon. Donald M. Mosley, District Judge
Attorney General
Clark County District Attorney
Wolfson & Glass
Clark County Clerk

[7]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.