IN THE SUPREME COURT OF THE STATE OF NEVADA

ALVIN B. GO-TAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85151

FILED

JUN 16 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from an amended judgment of conviction, pursuant to a jury verdict, of sexual assault of a child. Second Judicial District Court, Washoe County; Egan K. Walker, Judge.

In May 2008, appellant Alvin Go-Tan was discovered digitally penetrating and performing cunnilingus on 13-year-old T.C. Go-Tan admitted the sexual conduct to police but stated he did not force T.C. The State charged Go-Tan with sexual assault of a child and lewdness with a child under the age of 14. As written at that time, NRS 200.366(1) (2007) required the State to show the child-victim either did not or could not consent to the sexual act to prove sexual assault of a child. *Honea v. State*, 136 Nev. 285, 288, 466 P.3d 522, 525 (2020).

Less than a month before the October 2008 preliminary hearing, Go-Tan moved to the Philippines. The State proceeded to a grand jury, where T.C. testified she and Go-Tan had been alone in the house and that she slept through the assault. The grand jury returned a true bill and the State indicted Go-Tan on both counts. Go-Tan was arrested in the Philippines and extradited to Nevada in 2020. The case proceeded to trial in May 2022, where T.C. testified that she had been awake and non-consenting during the assault, and that Go-Tan had sexually abused her

throughout her childhood. The jury found Go-Tan guilty on both counts and Go-Tan was sentenced to 35 years to life.

On appeal, Go-Tan argues the trial court erroneously failed to dismiss the indictment because T.C. untruthfully told the grand jury she slept through the assault and there was incompetent evidence of T.C.'s age. As to trial, Go-Tan contends the district court improperly instructed the jury on flight, barred his rebuttal expert from testifying, and admitted evidence of the prior sexual conduct. Go-Tan further argues that the district court erroneously ordered the forfeiture of restitution and extradition costs from the cash bail.

We are unpersuaded by Go-Tan's arguments regarding the indictment. An indictment will be sustained so long as "there is the slightest sufficient legal evidence and best in degree appearing in the record," even if improper or inadmissible evidence was presented to a grand jury. *Avery v. State*, 122 Nev. 278, 285, 129 P.3d 664, 669 (2006) (internal quotation marks omitted). T.C. testified to the grand jury that she was asleep during the assault, indicating lack of consent as NRS 200.366(1) then required. The grand jury also heard other adequate evidence to support the indictment, including T.C.'s testimony of the circumstances surrounding the assault, her brother's eyewitness account, and the responding officer's testimony of Go-Tan's admissions. T.C.'s later revision at trial—that she was awake but non-consenting—changes the way in which Go-Tan's assault fulfilled the lack-of-consent element of NRS 200.366(1), but not the outcome. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); *United States v. Harmon*, 833 F.3d 1199, 1204 (9th Cir. 2016) (errors in the grand jury proceedings are not grounds for a new trial or dismissal of the charges where a petit jury

later returns a conviction). Nor did the grand jury rely on incompetent evidence of T.C.'s age where both T.C. and her brother testified to that fact. *See* NRS 51.265 ("Reputation among members of a person's family by blood or marriage . . . is not inadmissible under the hearsay rule if it concerns his or her birth . . . ."); *Gordon v. Eighth Judicial Dist. Court*, 112 Nev. 216, 223, 913 P.2d 240, 245 (1996) (explaining that hearsay that falls within a statutory exception under NRS Chapter 51 may be considered by a grand jury); 5 Clifford S. Fishman & Anne Toomey McKenna, *Jones on Evidence* § 35:42 (7th ed. 2023 update) (recognizing that generally a person may testify to her own age).

We are likewise unpersuaded by Go-Tan's allegations of trial error. First, a flight instruction is proper where the evidence supports "that the defendant fled with consciousness of guilt and to evade arrest." *Rosky v. State*, 121 Nev. 184, 199, 111 P.3d 690, 699-700 (2005). Because a flight inference fairly flows from the record facts, the district court did not abuse its discretion in giving a flight instruction. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (reviewing the settling of jury instructions for an abuse of discretion).

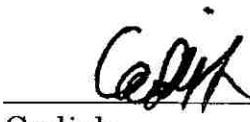
Nor did the district court abuse its discretion by excluding Go-Tan's rebuttal witness. *Sampson v. State*, 121 Nev. 820, 827, 122 P.3d 1255, 1259 (2005) (reviewing the decision to exclude expert testimony for an abuse of discretion). Go-Tan's counsel noticed the expert only as a rebuttal witness to the State's grooming expert—whom Go-Tan successfully moved to exclude. Defense counsel thereafter indicated he may still call the rebuttal witness but did not provide a supplemental notice. Instead, in the middle of trial, defense counsel sought to call the expert to opine as to why T.C. fabricated and then recanted her 2008 account. These facts support

the district court's findings of ambush and bad faith, both of which warrant exclusion, and validate the district court's concern that the expert was poised to improperly testify to T.C.'s credibility. NRS 174.234(3)(a)-(b); *Guidry v. State*, 138 Nev., Adv. Op. 39, 510 P.3d 782, 794 (2022) (bad faith); *Turner v. State*, 136 Nev. 545, 553, 473 P.3d 438, 447 (2020) (ambush); *State v. Eighth Judicial Dist. Court* (*Romano*), 120 Nev. 613, 622, 97 P.3d 594, 600 (2004) (credibility opinions), *overruled on other grounds by Abbott v. State*, 122 Nev. 715, 138 P.3d 462 (2006). To the extent Go-Tan argues the district court should have further delayed trial for defense counsel to make a more detailed offer of proof, we do not fault the district court for declining to do so here, where defense counsel had previously delayed trial and failed to provide a satisfactory offer of proof when asked. *Sampson*, 121 Nev. at 827, 122 P.3d at 1260 (noting that waste of judicial time should factor into a court's decision to allow late-disclosed witness testimony).

Third, we agree with the district court that the evidence of Go-Tan's prior sexual acts on T.C. was admissible under NRS 48.045(3), which expressly allows evidence of acts constituting separate sexual offenses in a prosecution for a sexual offense. *Franks v. State*, 135 Nev. 1, 3-4, 432 P.3d 752, 755 (2019). And given our recent decision upholding *Franks* and clarifying NRS 48.045(3)'s mechanics in *State v. Eighth Judicial District Court* (*Doane*), 138 Nev., Adv. Op. 90, 521 P.3d 1215, 1218 (2022), we decline Go-Tan's invitation to revisit or modify *Franks*.

The State concedes the bail issue, and we accordingly order a limited remand for the district court to reinstate the July 18, 2022, judgment of conviction that did not direct fees to be paid from the bail deposit. Having concluded Go-Tan otherwise fails to show error, we

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



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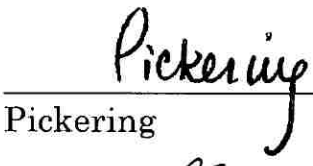

_____, J.
Pickering

_____, J.
Bell

cc: Hon. Egan K. Walker, District Judge
Richard F. Cornell
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk