IN THE SUPREME COURT OF THE STATE OF NEVADA

DEON JONES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86928

ORDER AFFIRMING IN PART, VACATING IN PART, AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of sex trafficking of a child under 14 years of age, first-degree kidnapping, and sexual assault of a minor under 14 years of age, for which the district court imposed consecutive sentences totaling 55 years to life, and fines of $520,000. Eighth Judicial District Court, Clark County; Erika D. Ballou, Judge.

Jones raises several trial issues on appeal, arguing that the district court erred by denying his *Batson v. Kentucky*, 476 U.S. 79 (1986), challenges, refusing to admit evidence of the victim's prior false allegations and prior acts, and improperly admitting some of the State's evidence and expert testimony. Jones further argues the district court judge demonstrated bias at sentencing that required her to recuse herself.

The district court properly addressed and denied the Batson challenges

Jones first argues that the district court erred in rejecting his *Batson* challenge to the State's striking of two prospective jurors based on race. *See id.* at 86 (prohibiting use of a peremptory challenge to strike a prospective juror based on race). District courts resolve a *Batson* challenge using a three-step process: (1) the opponent of the strike makes a prima facie showing of impermissible discrimination; (2) the proponent offers a race-neutral explanation; and (3) the district court determines whether the

opponent has shown purposeful discrimination. *Williams v. State*, 134 Nev. 687, 689, 429 P.3d 301, 305-06 (2018). We review the district court's factual determinations in a *Batson* analysis for clear error. *Id.* at 689, 429 P.3d at 306; *see also Flowers v. Mississippi*, 588 U.S. 284, 303 (2019) (applying a "highly deferential" standard to the trial court's factual findings at a *Batson* hearing (internal quotation marks omitted)).

Jones challenged the district court's step three analysis of the state's peremptory strikes of two African American women, prospective jurors 140 and 070. The district court handled the *Batson* challenge with care. It allowed the lawyers to make a record outside the presence of the jury, ensured each step of the *Batson* analysis was addressed, and created a record of its reasoning. The district court accepted the State's race-neutral reasons that the same district attorney's office was prosecuting prospective juror 140's close family member and that prospective juror 070's demeanor was unusual because "she didn't seem as if she was with it[,] . . . she seemed to be under the influence," and she was "laughing and giggling inappropriately" and that her body language was "weird and slouched." Determinations regarding a prospective juror's demeanor lie "peculiarly within a trial judge's province." *Williams*, 134 Nev. at 693, 429 P.3d at 308 (internal quotation marks omitted). Jones fails to show clear error or an abuse of discretion by the district court in rejecting his *Batson* challenges.

The district court erred in denying Jones's motion to admit evidence of H.E.'s prior false allegations, but that error was harmless

Jones sought to introduce evidence that his accuser, H.E., had made prior false accusations of sexual assault where she claimed an unidentified male CPS worker touched her inappropriately, and separately during a fight with her father, she yelled "he's trying to rape me!" The district court excluded the evidence because the prior false accusations were

not made to law enforcement or an authority figure. On appeal, Jones argues that he had the right to impeach the victim with the prior-false-accusation evidence and that the district court erred in excluding it under *Miller v. State*, 105 Nev. 497, 779 P.2d 87 (1989).

A victim's prior sexual conduct is generally inadmissible under Nevada's rape shield law. NRS 50.090. But a victim's prior false accusations of sexual assault are not barred by the rape shield law in a sexual assault case where the defendant seeks to use that evidence to impeach the witness. *Miller*, 105 Nev. at 501, 779 P.2d at 89. Before introducing evidence of prior false allegations, "the defendant must prove by a preponderance of the evidence that '(1) the accusations were made; (2) the accusations were false; and (3) the extrinsic evidence is more probative than prejudicial.'" *Abbott v. State*, 122 Nev. 715, 733, 138 P.3d 462, 474 (2006) (quoting *Efrain M. v. State*, 107 Nev. 947, 950, 823 P.2d 264, 265 (1991). A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

The district court found that H.E.'s accusations did not rise to the level of "actual allegations" under *Miller* because H.E. made the statements in the "heat of the moment" and did not make the statements to law enforcement or anyone else "in authority." Nevada law, however, does not impose such a requirement. *See Abbott v. State*, 122 Nev. 715, 721, 735, 138 P.3d 462 466-67, 475 (2006) (victim reported to a friend, an adult, and daycare personnel). It was error for the district court to categorically exclude the prior accusations based on the lack of contemporaneous reporting to authorities.

The error, however, was harmless. "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." NRS 178.598. "An error is harmless when it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Wegner v. State*, 116 Nev. 1149, 1155, 14 P.3d 25, 30 (2000) (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006). Here, the question of guilt was not close. H.E. identified Jones in a photo line-up. At trial, H.E. offered detailed testimony describing the crimes against her and accurately described the inside of his home including distinctive red doors, which lends credibility to her story and undermines Jones's version. Further, the State offered corroborating testimony by H.E.'s mother and the investigating detective, and Jones admitted to meeting H.E.

Additionally, during Jones's examination of a Child Protective Services employee, he elicited testimony that H.E. was untruthful, and that she believed H.E. "would make up a lie in order to get herself out of a bad situation." Because H.E.'s untruthfulness was put to the jury, the specific allegations of prior false accusations had modest probative value. *See* NRS 48.035(2). A rational jury would have found Jones guilty beyond a reasonable doubt even with the evidence of H.E.'s prior false accusations, and any error here is harmless.

The district court properly denied Jones's motion to admit evidence of H.E.'s prior sexual experiences

Jones next argues that H.E.'s prior prostitution and other sexual activity educated her on how to contrive false allegations against him, and the district court failed to make adequate findings of fact and conclusions of law in denying the motion to admit that evidence under

Summitt v. State, 101 Nev. 159, 164, 697 P.2d 1374, 1377 (1985). Nevada's rape shield law substantially limits a defendant's inquiry into the victim's past sexual history. NRS 50.090; *Guitron v. State*, 131 Nev. 215, 225, 350 P.3d 93, 100 (Ct. App. 2015). But the constitution and due process will allow the defendant to use such evidence where necessary to show the victim's prior independent knowledge. *Guitron*, 131 Nev. at 225, 350 P.3d at 100; *see also Summitt*, 101 Nev. at 164, 697 P.2d at 1377.

At a pretrial hearing, the parties stipulated to admit certain exhibits and agreed that there was nothing left for the district court to resolve on the *Summitt* motion. At trial, Jones renewed the *Summitt* motion, arguing that H.E.'s testimony about not knowing what a "date" was prior to meeting Jones "flies in the face of the record and the documents in this case," and that the State opened the door to introduce added evidence of H.E.'s prior prostitution. The court conducted a hearing outside the presence of the jury, where H.E. testified that she had never heard the term "date" in the context of prostitution prior to meeting Jones. Based on that testimony, the court denied the renewed *Summitt* motion.

It was not plain error for the district court to accept the parties' stipulation. *Baltazar-Monterrosa v. State*, 122 Nev. 606, 614, 137 P.3d 1137, 1142 (2006). Furthermore, H.E.'s testimony at trial and outside the presence of the jury provided no new evidence of sexual history or knowledge which would warrant admission under *Summitt*. Thus, the district court's analysis denying the renewed motion was not an abuse of discretion.

The district court did not abuse its discretion by granting the State's motion to admit evidence of Jones's prior bad acts

Jones next argues that the district court erred by failing to hold an evidentiary hearing before admitting his Arizona conviction under NRS

48.035(3) and NRS 48.045(2). This court reviews a district court's decision to admit prior-bad-act evidence for abuse of discretion. *Newman v. State*, 129 Nev. 222, 231, 298 P.3d 1171, 1178 (2013). Reversal is not warranted "absent a showing that the decision is manifestly incorrect." *Rhymes v. State*, 121 Nev. 17, 21-22, 107 P.3d 1278, 1281 (2005).

Although NRS 48.045(2) bars propensity evidence, NRS 48.045(3) creates an exception that allows "the admission of evidence in a criminal prosecution for a sexual offense that a person committed another crime, wrong or act that constitutes a separate sexual offense." To admit evidence of prior bad acts per NRS 48.045(3), the district court must conduct a "thoughtful, holistic analysis, including considerations of whether the prior acts were based on 'proven facts,' whether the acts corroborated or bolstered the victim's testimony and credibility, and whether their probative value was clear and not 'capable of multiple characterizations.'" *Alfaro v. State*, 139 Nev., Adv. Op. 24, 534 P.3d 138, 149 (quoting *United States v. LeMay*, 260 F.3d 1018, 1028-29 (9th Cir. 2001)); *see also Franks v. State*, 135 Nev. 1, 4-7, 432 P.3d 752, 755-57 (2019) (applying the *LeMay* factors).

Jones's argument that the prior Arizona conviction falls outside the statutory definition of "sexual offense" fails because NRS 48.045(3) includes any other "crime, wrong or act" so long as it constitutes a "sexual offense." The statutory title of what Jones pleaded to is immaterial to this determination so long as the acts themselves constitute a sexual offense. *See, e.g.*, *Alfaro*, 139 Nev., Adv. Op. 24, 534 P.3d at 148 (treating uncharged acts as sexual offenses under the *Franks* and *LeMay* test). The acts related to the prior Arizona conviction included a prostitute who "worked" for Jones

and whom Jones transported between Nevada, California, and Arizona, which constitutes a sexual offense by statute. NRS 179D.097.

As to prejudicial effect, the district court did not manifestly abuse its discretion by ruling in the State's favor where the State provided sufficient analysis to show that the probative value outweighed the prejudicial effect. Finally, because NRS 48.045(3) does not require an evidentiary hearing, Jones does not show that the failure to hold one here warrants reversal. *See Franks*, 135 Nev. at 4-7, 432 P.3d at 755-57 (addressing such evidence without requiring a hearing). The district court did not abuse its discretion when it admitted this evidence.

The district court properly admitted the State's expert witnesses

Jones argues that the district court erred by denying his motion to bar expert testimony from two LVMPD officers on prostitution and pimping culture. He contends that the evidence failed to meet the "assistance requirement" under *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008), was not relevant under NRS 48.015, and that the district court failed to fully evaluate the probative value versus prejudicial effect of the testimony. A district court's decision to allow expert testimony is reviewed on an abuse-of-discretion standard. *Higgs v. State*, 126 Nev. 1, 14, 222 P.3d 648, 656 (2010) (citing *General Electric Co. v. Joiner*, 522 U.S. 136 (1997)).

NRS 201.305 expressly allows expert testimony regarding pimp/prostitution subculture in pandering or sex trafficking cases. The State noticed Don Hoier and Richard Leung as intended experts to testify "in the area of pimp and prostitution subculture, including cultural norms and the nature of the subculture, dynamics of pimp-prostitute relations, terminology and language, and known behaviors from the pimp and prostitution subculture." Because Jones was charged with a sex trafficking

crime, the expert testimony as proposed by the State is relevant and would assist the jury under NRS 201.305. The district court did not abuse its discretion in admitting the testimony from Hoier and Leung.

The district court did not abuse its discretion by admitting the State's evidence at trial

Jones argues the district court improperly admitted State's evidence at trial including (1) a cell phone video related to the Arizona conviction depicting Jones as a pimp; (2) audio recordings of police interviews with H.E.; and (3) several of Jones's redacted Instagram messages. Jones also contends the district court failed to conduct the NRS 48.035 balancing test prior to admitting the evidence, despite his timely objections. Evidence is inadmissible under NRS 48.035(1) "when its probative value is substantially outweighed by the danger of unfair prejudice." *Harris v. State*, 134 Nev. 877, 880, 432 P.3d 207, 210-11 (2018).

At trial, Jones maintained that he was not a pimp. The video is clearly relevant and highly probative to the issue of Jones pimping, because the videos described Jones's knowledge of pimping and pimping language. Although Jones additionally argues that one of the videos was not relevant because the geographic location is uncertain, that issue goes to weight, not admissibility.

Jones next challenges the admission of audio recordings of H.E.'s police interviews, arguing they were prejudicial or confusing, but his objection at district court was on different grounds. The district court did not explicitly weigh the probative versus prejudicial value, but because Jones did not raise that issue at trial, it was not plain error to not make a finding on the record. *See Jeremias v. State*, 134 Nev. 46, 55, 412 P.3d 43, 52 (2018) (reviewing for plain error when the defendant objected on a different basis below). In any event, considering Jones's theory that H.E.

recently fabricated her testimony, evidence to the contrary is neither compound nor confusing, and the record does not support Jones's argument that the prejudicial effect outweighed the probative value.

Finally, turning to the Instagram messages, Jones argues that "the prejudicial effect of heavily redacting these messages outweighed their probative value." The district court admitted the Instagram evidence but ordered the State to significantly redact the messages where they talked about pimping, since that was an uncharged crime unrelated to the already admitted prior bad acts. The district court considered the probative value of placing Jones at the scene of the crime against the prejudicial value as Jones presented it. This evidence is clearly probative to an issue in dispute, and Jones's redactions argument presents, at best, minimal prejudicial effect. The district court did not abuse its discretion by admitting this evidence.

The district court exhibited improper bias at the sentencing hearing

Jones argues that the district court judge's bias at the sentencing hearing and failure to voluntarily recuse herself deprived him of a fair trial or was an abuse of discretion. Because Jones did not object at sentencing, we review for plain error. *Martinorellan v. State*, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015). "[R]eversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights." *Id.* "[A] plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice . . . ." *Jeremias*, 134 Nev. at 51, 412 P.3d at 49 (citing *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008).

"A judge shall not act as such in an action or proceeding when the judge entertains actual bias or prejudice for or against one of the parties to the action." NRS 1.230(1). "A judge shall perform the duties of judicial

office, including administrative duties, without bias or prejudice." NCJC Canon 2.3(A). A judge shall disqualify themself when their "impartiality might reasonably be questioned" including when that judge has personal bias toward a party. NCJC Canon 2.11(A). "[D]isqualification for personal bias requires 'an extreme showing of bias [that] would permit manipulation of the court and significantly impede the judicial process and the administration of justice.'" *Millen v. Eighth Jud. Dist. Ct.*, 122 Nev. 1245, 1254-55, 148 P.3d 694, 701 (2006) (quoting *City of Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 632, 636, 940 P.2d 127, 129 (1997)).

Sentencing decisions are left to the district court's sound discretion. *Parrish v. State*, 116 Nev. 982, 988, 12 P.3d 953, 957 (2000). This court will not interfere unless the record demonstrates "prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). "[A]n opinion formed by a judge on the basis of facts introduced or events occurring in the course of the current 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.'" *Kirksey v. State*, 112 Nev. 980, 1007, 923 P.2d 1102, 1119 (1996) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)). A trial judge's comments may indicate bias when they "are so pervasive and of such a magnitude that the trial ambiance is discernibly unfair to the defendant when viewed from the cold record on appeal." *McNair v. State*, 108 Nev. 53, 62, 825 P.2d 571, 577 (1992) (citing *United States v. Polizzi*, 500 F.2d 856, 892 (9th Cir. 1974). "[R]emarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or

her mind to the presentation of all the evidence." *Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998). But a district court judge does not show bias when their comments merely indicate they are "offended by the facts of the crime committed" rather than motivated by "any personal feelings of animosity" towards the defendant, so long as the judge does not rely on "impalpable or highly suspect evidence." *Id.* at 1283, 968 P.2d at 1170-71; *see also Alfaro*, 139 Nev., Adv. Op. 24, 534 P.3d at 151-52.

At sentencing, the district court imposed the maximum sentence of 55 years to life and the maximum allowable fine of $520,000. The district court judge then delivered an oral reprimand to Jones:

> I cannot think of anyone who's had less remorse. I was a defense attorney for 16—for almost 16 years. I could find something of value for every client I have ever had. I have been able to find nothing of value in your existence. You make me sick. The way that you're looking and grinning. The way that at every break in the trial, you were screaming so loud at your defense attorneys. The way that you were grinning and making faces at [H.E.] when she was testifying. I have never ever wanted anyone to die in prison, until you. I can't even express how disgusting you are to me and I hope that little girl is able to get some peace knowing that you will never walk the face of this Earth as a free human again.

The comments by the judge here go beyond any threshold set by our earlier cases. These comments were not brief departures from strict impartiality but were rather a revelation of the judge's private opinion of Jones himself. The judge's comments here plainly showed she went beyond mere offense at the acts and indicated personal animosity to Jones based on her own prior experience. Thus, the judge here improperly put herself in the shoes of both the victim and counsel. Finally, the judge alluded to

observations outside the legal record, implicating impalpable and highly suspect evidence. The judge's bias and partiality can certainly be questioned considering her extreme statements. The district court judge's comments show a deep-seated antagonism towards Jones that made fair judgment impossible.

Jones does not identify any instance of bias or prejudice at trial, so under the plain error standard, the conviction stands. But the judge's bias and prejudice at sentencing is readily apparent, and calls into question the fairness of the sentence. We acknowledge that Jones has not argued that the sentence itself is illegal, and that an unbiased judge could very well hand down the same sentence. Nevertheless, we conclude that under the plain error standard, the sentence is unreliable. We therefore remand for resentencing before a different district court judge. Accordingly, we

ORDER the judgment of the conviction AFFIRMED, the sentencing VACATED, AND REMAND this matter to a different district court department for proceedings consistent with this order.

Stiglich, J.
Stiglich

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

cc: Hon. Erika D. Ballou, District Judge
Oronoz & Ericsson, LLC
Attorney General/Carson City
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Eighth District Court Clerk