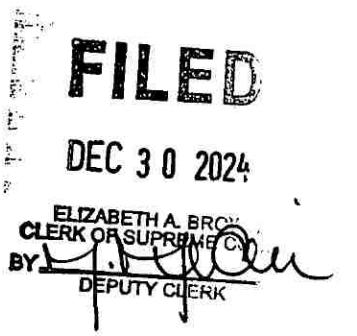
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN JOHN MENTABERRY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 88476-COA



ORDER OF AFFIRMANCE

Kevin John Mentaberry appeals pursuant to NRAP 4(c) from a judgment of conviction, entered pursuant to a jury verdict, of lewdness with a 14 or 15 year old child. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

Motion to dismiss the appeal

As a threshold matter, the State has filed a motion to dismiss this appeal pursuant to NRAP 4(c)(4). The State argues that the district court erroneously granted Mentaberry postconviction habeas relief because Mentaberry failed to demonstrate he was deprived of his right to a direct appeal.

In his petition, Mentaberry argued that counsel was ineffective for failing to advise him about his right to an appeal and for failing to perfect an appeal. A petitioner alleging they have been deprived of the right to an appeal due to ineffective assistance of counsel must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice in that the petitioner would have appealed but for counsel's deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d

504, 505 (1984) (adopting the test in *Strickland*); *see also Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000); *Lozada v. State*, 110 Nev. 349, 357, 871 P.2d 944, 949 (1994), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 426 n.18, 423 P.3d 1084, 1100 n.18 (2018). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 687. Further, the petitioner must demonstrate the underlying facts by a preponderance of the evidence. *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

The district court held an evidentiary hearing on this claim, in which Mentaberry and counsel testified. Although the district court found Mentaberry's testimony that he was not informed of his right to an appeal was not credible, the district court granted Mentaberry relief on a different theory: counsel's failure to disclose legal authority to the sentencing court deprived Mentaberry of the right to an appeal. Specifically, the district court found that counsel failed to disclose known legal authority indicating Mentaberry was not eligible for probation,[1] that Mentaberry was illegally placed on probation as a result,[2] and that Mentaberry would have appealed

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[1]Counsel testified that, even though he knew there was a statute to the contrary, he "assumed" the offense was probationable and that he "had just missed whatever [he] needed to look at" because the Division of Parole and Probation, the State, and the judge believed the offense was probationable.

[2]The parties do not dispute that the imposition of probation was illegal or that the district court properly corrected the judgment of conviction to remove the illegal sentence.

had he not been placed on probation. These findings are supported by the record. Therefore, we conclude the district court did not err in determining that Mentaberry was deprived of his right to appeal due to the ineffective assistance of counsel. Accordingly, the district court properly granted Mentaberry's postconviction habeas petition, and we deny the State's motion to dismiss this appeal.

Merits of the appeal

Mentaberry first argues the district court plainly erred in failing to excuse two jurors who knew a prosecution witness: S. Eklund, the victim's mother. The State contends that this court should decline to review this claim for plain error because Mentaberry had the opportunity to voir dire the challenged jurors and did not express any concern regarding these jurors below.

Even assuming Mentaberry has not waived this claim, *cf. Sayedzada v. State*, 134 Nev. 283, 288, 419 P.3d 184, 190 (Ct. App. 2018) (holding a defendant waives any challenge to the seating of a juror on appeal if they were "aware of the basis for the challenge at the time of voir dire, had the opportunity to challenge the prospective juror on those facts but ultimately declined to do so, and approved the juror's presence on the jury panel"), we nonetheless conclude Mentaberry is not entitled to relief. Mentaberry concedes he did not request that the jurors be excused below; therefore, we review this claim for plain error. *See Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). To demonstrate plain error, an appellant must show that: "(1) there was an 'error'; (2) the error is 'plain,' meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected [their] substantial rights." *Id.*

Before the State called its first witness, juror no. 1 informed the court that he knew "of" Eklund. Upon questioning, juror no. 1 stated that (1) he did not know Eklund personally and had never met her, but he knew her husband's stepson; (2) the stepson was "pretty much" his nephew and he saw the stepson "all the time"; (3) he had no prior knowledge of the case and had never discussed the case with the stepson; and (4) rendering any verdict in the case would not make it hard for him to see the stepson, he could be fair and impartial, and he did not believe there was any issue at all. The juror's statements, and his relationship to the witness's husband's stepson, do not clearly indicate that the juror was biased, either actually, impliedly, or inferably. *See Sayedzada*, 134 Nev. at 289-91, 419 P.3d at 191-93 (discussing the three types of juror bias).

Likewise, after Eklund was called as a witness, juror no. 11 informed the court that he recognized Eklund. Juror no. 11 stated that he did not know her personally and they were not friends but that he simply recognized her face from events around town. Juror no. 11 also stated that he could evaluate Eklund's credibility fairly and impartially. The juror's statements do not clearly indicate that the juror was biased, either actually, impliedly, or inferably. *See id.* Therefore, Mentaberry fails to demonstrate the district court plainly erred by failing to excuse these jurors.

Second, Mentaberry argues the district court plainly erred in admitting the following hearsay evidence: a counselor's testimony regarding what the victim told her during a therapy session and a video of a forensic interview with the victim. Mentaberry concedes that he did not object below to this evidence on the grounds now asserted; therefore, we also review this

claim for plain error.[3] *See Lamb v. State*, 127 Nev. 26, 40, 251 P.3d 700, 709 (2011).

Regarding the counselor's testimony, Mentaberry contends that the testimony was not admissible as a prior consistent statement. *See* NRS 51.035(2)(b). Although the State challenges this contention, it also argues that the testimony was admissible on other grounds, such as a statement made for the purposes of medical diagnosis or treatment. *See* NRS 51.115. Specifically, the State argues the district court did not plainly err in admitting this testimony because the victim's statements were made during a "crisis" counseling session, the counselor had been treating the victim in concert with a licensed psychiatrist for at least three years, and the counselor was not working for law enforcement.

Mentaberry does not respond to the State's claim that the testimony was admissible on other grounds in his reply brief, and we treat Mentaberry's lack of response as a concession that the State's position is meritorious. *See Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that the appellants' failure to challenge contentions that "appear to have merit and to be supported by authority" constituted a clear concession that the respondents' position had merit). Having conceded that the challenged testimony was admissible on other grounds, Mentaberry fails to demonstrate the district court plainly erred by admitting this evidence.

Regarding the forensic interview, Mentaberry generally asserts that no exception to the hearsay rule applies to the admission of the video.

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[3]At trial, Mentaberry objected to admission of the video on the basis that it was redundant or cumulative, not on the basis that it constituted inadmissible hearsay.

The State contends that the video was admissible pursuant to NRS 47.120[4] because Mentaberry used statements from the interview to impeach the victim and, thus, the State was entitled to introduce the video to provide context to the victim's statements. Again, Mentaberry does not respond to the State's claim that the video was admissible pursuant to NRS 47.120, and we treat Mentaberry's lack of response as a concession that the State's position is meritorious. *See Colton*, 71 Nev. at 72, 279 P.2d at 1036. Having conceded that the video was admissible pursuant to NRS 47.120, Mentaberry fails to demonstrate the district court plainly erred by admitting this evidence.

Finally, Mentaberry argues there was insufficient evidence to support the jury's verdict. Specifically, Mentaberry contends the State failed to present evidence that he had the specific intent to arouse, appeal to, or gratify the lust or passions or sexual desires of himself or the victim.

When reviewing the sufficiency of the evidence supporting a conviction, the court considers "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "[A] lewdness victim's testimony need not be corroborated" in order to sustain a conviction. *Franks v. State*, 135 Nev. 1, 7, 432 P.3d 752, 757 (2019); *see also Gaxiola v. State*, 121 Nev. 638, 650, 119 P.3d 1225, 1233 (2005).

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[4]NRS 47.120(1), also known as the rule of completeness, provides that, "When any part of a writing or recorded statement is introduced by a party, the party may be required at that time to introduce any other part of it which is relevant to the part introduced, and any party may introduce any other relevant parts."

As previously discussed, Mentaberry was convicted of lewdness with a child who is 14 or 15 years of age. A person who is 18 years of age or older is guilty of lewdness with a child if he or she

> willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 16 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child.

NRS 201.230(1)(a). To obtain a conviction, the State was required to prove that Mentaberry specifically intended a lewd or lascivious act to arouse, appeal to, or gratify the lust or passions or sexual desires of himself or the victim. *See Moore v. State*, 136 Nev. 620, 623, 475 P.3d 33, 36 (2020).

At trial, the victim testified as follows. She went to a friend's house late at night for a New Year's Eve party. At some point during the night, she was lying down on a couch next to a dog and her friend was lying down at the other end of the couch. Mentaberry sat down on the couch, moved the dog, and scooted closer to her. Mentaberry began touching her stomach and asked how old she was. Mentaberry touched her stomach under her shirt and touched her breasts. Mentaberry also put his hand down her pants and touched her vagina for a couple minutes and told her to spread her legs so he could use his mouth. Eventually, her friend woke up and told Mentaberry to go upstairs. The victim told her friend that Mentaberry touched her, and they went into a room and locked the door. The next day, Mentaberry drove her home and apologized for being a "drunken idiot."

The victim's friend testified that the victim and Mentaberry were sitting "fairly close" together on the couch, she could not see Mentaberry's hands, and that she fell asleep on the couch. She also testified

that, after she woke up, the victim told her that Mentaberry had touched her stomach, and she saw a tear on the victim's face.

Although Mentaberry testified that he did not touch the victim, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses." *Rose v. State*, 123 Nev. 194, 202-03, 163 P.3d 408, 414 (2007) (alteration in original) (quotation marks omitted). Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that Mentaberry committed a lewd or lascivious act upon the victim's body with the specific intent to arouse, appeal to, or gratify the lust or passions or sexual desires of himself or the victim. *See Grant v. State*, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001) ("Intent need not be proven by direct evidence but can be inferred from conduct and circumstantial evidence."). Therefore, we conclude that there is sufficient evidence to support the jury's verdict. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Alvin R. Kacin, District Judge
Law Office of John Malone
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk