IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL JOSEPH QUATTRINI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40083

FILED

FEB 18 2004

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

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of six counts of lewdness on a child under the age of fourteen, one count of sexual assault with a child under the age of fourteen with use of a deadly weapon, two counts of sexual assault on a child under the age of fourteen, one count of sexual assault on a child under the age of sixteen with use of a deadly weapon, seven counts of sexual assault on a child under the age of sixteen, and five counts of sexual assault.

Appellant Daniel Quattrini was sentenced to concurrent terms of life imprisonment with a minimum parole eligibility of ten years for each of the six counts of lewdness, consecutive terms of life imprisonment with a minimum parole eligibility of twenty years for the sexual assault on a child under fourteen with use of a deadly weapon, two concurrent life sentences with a minimum parole eligibility of twenty years for the sexual assaults on a child under fourteen charges, consecutive terms of life imprisonment with a minimum parole eligibility of twenty years for the sexual assault on a child under sixteen years with use of a deadly weapon, seven concurrent terms of life imprisonment with a minimum parole eligibility of twenty years for the sexual assaults with a child under sixteen years, and five terms of life imprisonment with a minimum of parole eligibility of twenty years to run concurrently to each other but

consecutively to the other life sentences for the sexual assaults. The district court also sentenced Quattrini to pay a $25 administrative assessment fee, a $150 DNA fee, a $2,480 in restitution and a genetic marker testing fee.

Quattrini was charged with multiple counts for sexual misconduct involving his stepdaughter. The State alleged Quattrini had been sexually abusing his stepdaughter from the age of eleven until she was sixteen years old. The matter was reported to the police when Quattrini's spouse came home early from work and encountered Quattrini and her daughter naked in the master bedroom engaging in sexual intercourse. That evening the girl told her mother that Quattrini had been sexually molesting her for years. Quattrini left the house the following day and the mother reported the incidents the next week. The victim gave statements to the police, detailing the sexual conduct and indicating that Quattrini used a gun on two occasions in a manner to intimidate the victim into cooperating and remaining silent.

In addition to testimony from the mother and the victim, the State introduced testimony from Phyllis Suiter detailing the results of the sexual assault examination. Suiter indicated the condition of the victim's hymen was consistent with someone who had been engaging in sexual activity prior to the onset of puberty. The victim's brother testified that he sometimes encountered, after knocking at a closed bedroom door, Quattrini and his sister in her bedroom or the master bedroom. The State also called Dr. Jay Johnson, who testified that the victim had no actual hymen left and that this was caused by repeated penetration over several years, some of it before puberty.

Quattrini testified that he never threatened the victim with a gun, but that the victim had seen him cleaning his gun on one occasion

and on the other, the victim stopped him from committing suicide by struggling with him over the gun. He denied ever sexually abusing the victim, claiming that her physical findings and knowledge of sexual activity resulted from sexual conduct with her boyfriend. Quattrini stated that the victim wanted her parents to reunite and her conduct was a means to achieve that end. Quattrini also indicated the victim tried to proposition him on two occasions, climbing into bed with him while he was sleeping. He indicated he did not tell his wife about these events because he did not want to hurt his wife. As to the day when his wife observed him naked with the victim, he indicated he was having a panic attack when the victim walked into the bedroom and disrobed. He has no other clear memory of the events of that day until his wife walked in and found him naked with the victim sitting sideways on his lap.

Quattrini was originally charged with thirty-nine counts and the jury convicted him of twenty-two counts.

First, Quattrini argues the district court abused its discretion by denying his challenges for cause to Jurors 66 and 193. Quattrini alleged Juror 66 was prejudiced because her daughter had been sexually assaulted, and the juror initially indicated that she would presume the victim was telling the truth. She did indicate she could be impartial. Juror 193 was challenged because she initially thought the defendant had to prove he was not guilty, however, she stated she understood that was in error when the district court informed her of the correct standard.

A party must show that there was cause to challenge the juror under NRS 175.036(1).[1] A trial court has broad discretion in ruling on

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[1]See Thompson v. State, 102 Nev. 348, 350, 721 P.2d 1290, 1291 (1986).

challenges for cause.[2] A party must also show that he was prejudiced by the district court's denial of the challenge.[3] "If the impaneled jury is impartial, the defendant cannot prove prejudice."[4]

We conclude that the district court did not abuse its discretion by denying Quattrini's challenge for cause to Juror 193. The record indicates that Juror 193 was able to understand the burden of proof once it was explained by the district court.

As to Juror 66, even if the district court erred in not excusing her, Quattrini has failed to show he was prejudiced by having to use a peremptory challenge on Juror 66. On appeal, Quattrini has failed to demonstrate that any other jurors proved unacceptable and would have been excused had an additional peremptory challenge been available to him.

Next, Quattrini alleges the district court abused its discretion by refusing to give an advisory verdict of acquittal on counts XXV and XXX, sexual assault of a child under the age of sixteen by digital penetration. We disagree. The district court is permitted to advise the jury to acquit a defendant if the court believes the evidence is insufficient to warrant a conviction.[5] This court will not overturn a district court's decision to deny an advisory verdict absent an abuse of discretion.[6] "The

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[2]Walker v. State, 113 Nev. 853, 865, 944 P.2d 762, 770 (1997) (citing Wainwright v. Witt, 469 U.S. 412, 428-29 (1985)).

[3]Thompson, 102 Nev. at 350, 721 P.2d at 1291.

[4]Wesley v. State, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996).

[5]NRS 175.381(1).

[6]See NRS 175.381; Milton v. State, 111 Nev. 1487, 1493, 908 P.2d 684, 688 (1995) (citations omitted).

question for the reviewing court is '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.'"[7] The jury determines the weight and credibility to give conflicting testimony.[8] In a sexual assault case, the jury may convict on the uncorroborated testimony of the victim.[9]

The victim stated Quattrini digitally penetrated her several times. While the victim was unable to recount specific instances, she stated that digital penetration was part of the regular sexual abuse she suffered from Quattrini. Therefore, a rational trier of fact could have found that Quattrini digitally penetrated the victim. Accordingly, we conclude that the district court did not abuse its discretion by refusing to offer an advisory verdict of acquittal on counts XXV and XXX.

Quattrini asserts that the district court abused its discretion when it refused to give two of his proposed instructions. We disagree. "[A] party is entitled to have the jury instructed on all of his case theories that are supported by the evidence," as long as the instruction is consistent with existing case law and does not have a tendency to mislead the jury.[10] This court will not reverse a judgment "by reason of an erroneous instruction, unless upon a consideration of the entire case, including the evidence, it shall appear that such error has resulted in a miscarriage of

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[7]Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original).

[8]Deeds v. State, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981).

[9]Id.

[10]Silver State Disposal v. Shelley, 105 Nev. 309, 311, 774 P.2d 1044, 1045-46 (1989).

justice."[11] "[I]t is not error to refuse to give an instruction when the law encompassed therein is substantially covered by another instruction given to the jury."[12]

The district court refused to offer Instruction F, which states:

> Although the use of a firearm connotes something more than a bare potential for use, there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by means or display of a firearm in aiding the commission of one of the specified felonies. 'Use' means, among other things, 'to carry out a purpose or action by means of,' to 'make instrumental to an end or process.'

Instead; the district court offered Instruction 13:

> In order to 'use' a deadly weapon, there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by means or display of the deadly weapon in aiding the commission of the crime.

Instruction F is a direct quote from People v. Chambers,[13] a California case. Instruction 13 is a direct quote from Culverson v. State.[14] In Culverson, this court quoted part of a paragraph (as seen in Instruction

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[11]Pfister v. Shelton, 69 Nev. 309, 310, 250 P.2d 239, 239 (1952) (internal citations and quotations omitted).

[12]Ford v. State, 99 Nev. 209, 211, 660 P.2d 992, 993 (1983).

[13]498 P.2d 1024 (Cal. 1972).

[14]95 Nev. 433, 435, 596 P.2d 220, 221 (1979).

13) from Chambers.[15] Instruction F is a substantial part of the rest of the paragraph from Chambers.[16]

In Culverson, this court chose to adopt only part of the rule put forth in Chambers. Therefore, Instruction 13 is a complete statement of Nevada law regarding "use" of a deadly weapon. Therefore, we conclude the jury was properly instructed on Nevada law regarding the "use" of a deadly weapon, and the district court did not abuse its discretion by refusing to offer Instruction F.

Quattrini also sought to have the district court offer Instruction D: "No corroboration of the testimony of any witness for the defense or any witness favorable to the defense is required in order to find the defendant not guilty." Defense counsel sought to have Instruction D offered to counterbalance Instruction 10: "There is no requirement that the testimony of an alleged victim of sexual assault and/or lewdness with a minor be corroborated, and her testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty."

Instruction D originates from Burke v. State,[17] an Alaskan case. Nevada law clearly supports Instruction 10, and we decline to adopt the rule from Burke at this time.[18] Accordingly, the district court properly instructed the jury on Nevada law, and we conclude the district court did not abuse its discretion by refusing to offer Instruction D.

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[15]Id. at 435, 596 P.2d at 221.

[16]See Chambers, 498 P.2d at 1027-28.

[17]624 P.2d 1240 (Alaska 1980).

[18]See LaPierre v. State, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992).

Next, Quattrini contends that the district court abused its discretion by allowing Quattrini's wife to testify that he held a gun to her head. "The decision to admit evidence after balancing its prejudice against its probative value is one addressed to the discretion of the trial judge."[19]

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except . . . [e]vidence of his character or a trait of character offered by an accused, and similar evidence offered by the prosecution to rebut such evidence.[20]

The prosecution is limited to presenting character evidence that rebuts the specific trait offered by the defendant.[21] "Evidence of specific acts is admissible only upon cross-examination or when the defendant's character is an essential element of the charge."[22] The state may not impeach the defendant's character with extrinsic evidence.[23] However, even if evidence is relevant, it is "not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury."[24]

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[19]Halbower v. State, 93 Nev. 212, 215, 562 P.2d 485, 487 (1977).

[20]NRS 48.045(1)(a).

[21]Roever v. State, 114 Nev. 867, 871, 963 P.2d 503, 505 (1998); NRS 48.055.

[22]Roever, 114 Nev. at 871, 963 P.2d at 505; NRS 48.055.

[23]McKee v. State, 112 Nev. 642, 646, 917 P.2d 940, 943 (1996).

[24]NRS 48.035(1).

We conclude that Quattrini did not open the door as to his good character as to family relations. Thus, the district court did not properly admit the character evidence from Quattrini's wife. Additionally, the evidence was not proper impeachment evidence. Although the State may be allowed to ask about specific instances of conduct on cross-examination for impeachment purposes, this evidence's probative value is substantially outweighed by its prejudicial value. Additionally, the State may not use extrinsic evidence, such as rebuttal witness testimony, to prove specific instances of conduct.

Nevertheless, we conclude that Quattrini was not prejudiced by this error. "In order for error to be reversible, it must be prejudicial and not merely harmless. The test is whether without reservation the verdict would have been the same in the absence of error.[25] There was substantial evidence against Quattrini. The victim's story was corroborated by her mother's personal observations of Quattrini engaging in sexual intercourse with the victim. Additionally, medical testimony corroborates the victim's testimony. Therefore, this error does not necessitate reversal of Quattrini's conviction.

Quattrini also claims his sentence is excessive, disproportionate, an abuse of discretion, and in violation of constitutional protections. The Eighth Amendment does not require strict proportionality between crime and sentence, but forbids only an extreme sentence that is grossly disproportionate to the crime.[26] Regardless of its

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[25]Ross v. State, 106 Nev. 924, 928, 803 P.2d 1104, 1106 (1990) (internal citations and quotations omitted).

[26]Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion).

severity, "[a] sentence within the statutory limits is not a 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'"[27]

This court has consistently afforded the district court wide discretion in its sentencing decision.[28] This court will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence."[29]

In the instant case, Quattrini does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant statutes are unconstitutional. The district court sentenced Quattrini in strict compliance with the mandatory sentencing guidelines on all counts except for the sexual assault counts, Counts XXXII, XXXIV, XXXV, XXXVI and XXXIX.

The statutory punishment for sexual assault, pursuant to NRS 200.366(2)(b), is life with minimum parole eligibility in 10 years. On these counts, Quattrini was sentenced to life with minimum parole eligibility in 20 years. Therefore, we reverse the sentences for Counts XXXII, XXXIV, XXXV, XXXVI and XXXIX and remand the matter so that the district court may impose proper sentences in accordance with NRS 200.366(2)(b)

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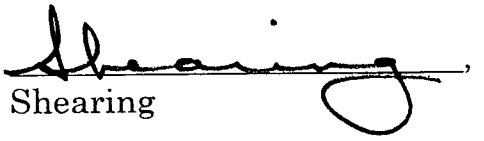
[27]Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson, 95 Nev. at 435, 596 P.2d at 221-22); see also Glegola v. State, 110 Nev. 344, 348, 871 P.2d 950, 953 (1994).

[28]See Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987).

[29]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

(2000). On the remaining counts, we note that the sentences were within the parameters provided by the relevant statutes[30] and do not constitute cruel and unusual punishment.[31] Accordingly, 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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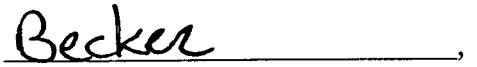

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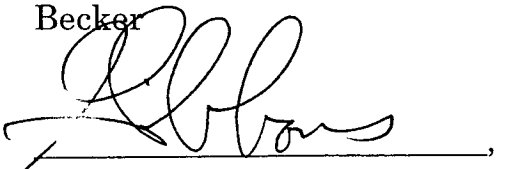

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cc: Hon. Nancy M. Saitta, District Judge
Clark County Public Defender
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[30]See NRS 200.366 (2000); NRS 201.230 (2000); NRS 193.165.

[31]Having reviewed Quattrini's other arguments regarding the sufficiency of the evidence to support the deadly weapon enhancements, the propriety of Nurse Suiter's testimony and the introduction of inculpatory evidence on rebuttal, we conclude they are without merit.