

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROLAND ZYBELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42224

FILED

AUG 13 2004

ORDER OF AFFIRMANCE

JANET L. BLOOM,
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, entered pursuant to a guilty plea, of one count of sexual assault on a child under the age of 16 years. The district court sentenced appellant Roland Zybell to serve a term of life in prison with the possibility of parole after 20 years. Zybell asks this court to reverse his sentence and remand his case for resentencing. Sixth Judicial District Court, Humboldt County; John M. Iroz, Judge.

First, Zybell contends that the district court erred when it accepted his guilty plea because the behavior described in the information was not the behavior he admitted to during the plea canvass. The information states that Zybell "placed his penis in the mouth of the victim" whereas defense counsel told the district court during the plea canvass that the penetration was "done in a digital fashion." Zybell failed to preserve this issue for appeal. Failure to raise an objection with the district court generally precludes appellate consideration of an issue.¹ This court may nevertheless address an assigned error if it was plain and

¹See Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997).

affected the appellant's substantial rights.² We conclude that no plain error occurred. The district court has wide latitude in how it establishes that a defendant entering a guilty plea has real notice of the true nature of the offense charged.³ Here, the district court established that Zybell understood the nature of the offense charged when trial counsel stated "[w]e would adopt the elements of the charge as stated in the guilty plea agreement, that in February of 2003, my client did subject the victim who is under 16 years old to sexual penetration," and Zybell acknowledged that he agreed with the factual basis as presented by trial counsel.

Second, Zybell contends that the district court erred when it failed to order a psychosexual evaluation despite the disparity between the two sentencing options--life with the possibility of parole after 20 years or a definite term of 20 years with the possibility of parole after 5 years.⁴ He asserts that NRS 200.366 is unconstitutional because it allows similarly situated persons to receive drastically different sentences, and he suggests that his right to equal protection was violated when the district court did not consider the results of a psychosexual evaluation before passing sentence. Zybell failed to preserve this issue for appeal, and we conclude that no plain error occurred.

"The Equal Protection Clause of the Fourteenth Amendment mandates that all persons similarly situated receive like treatment under

²See NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

³See Hurd v. State, 114 Nev. 182, 187, 953 P.2d 270, 273 (1998).

⁴See 2003 Nev. Stat., ch. 461, § 1, at 2825-6.

the law."⁵ Zybell's equal protection claim is not based on a fundamental right or his membership in a suspect class, so we will uphold NRS 200.366 if it is rationally related to a legitimate governmental interest.⁶ We conclude that the different sentences provided for in NRS 200.366 are rationally related to the government's interest in providing a range of sentencing options so that the district court may choose a punishment appropriate to the facts and circumstances of a particular case.⁷ Therefore, NRS 200.366 does not violate Zybell's equal protection rights.

Psychosexual evaluations are required when a defendant has been convicted of a sexual offense for which probation is available.⁸ The purpose of the evaluation is to determine whether a convicted sex offender represents a menace to the health, safety, or morals of others if probation is granted.⁹ Zybell is not eligible for probation.¹⁰ Therefore, the district court was not required to order a psychosexual evaluation.

Third, Zybell contends that the district court erred when it permitted the State's victim impact witness to raise other bad acts. Zybell failed to preserve this issue for appeal, and we conclude that no plain error occurred. NRS 176.015(3)(b) authorizes the victim to "[r]easonably express any views concerning the crime, the person responsible, the impact of the

⁵Gaines v. State, 116 Nev. 359, 371, 998 P.2d 166, 173 (2000).

⁶Id.

⁷See NRS 176.0125(3).

⁸NRS 176.139(1).

⁹See Dzul v. State, 118 Nev. 681, 696, 56 P.3d 875, 885 (2002).

¹⁰NRS 176A.100(1).

crime on the victim and the need for restitution."¹¹ During the sentencing hearing, the victim's mother read a prepared victim impact statement in which she stated:

This has affected us all in some very big ways. In my daughter's own words she has given details that were never disclosed by her father. She has told me and several other people these same details. My daughter has said that he had her grab his wiener. He had her put it in her mouth. He would put his mouth on her privates. He would use lotion to rub his wiener between her legs. Her father put his wiener in her bum, her butt. She was instructed to put lotion between her legs or sometimes he would do it for her. He put his finger in her butt and he had her put her own finger inside her own vagina.

He also fed her alcohol.

We conclude that this statement was a reasonable expression of the mother's views concerning Zybell and the impact of his crime on her daughter.

Fourth, Zybell contends that the district court erred when it permitted the State's expert witness to testify outside her area of expertise. Annie Perkins, a clinical social worker, testified that she met with the victim about seven times and that the victim exhibited classic symptoms of post-traumatic stress disorder. Zybell objected to this diagnosis, noting that the State had failed to establish that Perkins was an expert qualified to render such diagnoses. The district court sustained

¹¹See also Buschauer v. State, 106 Nev. 890, 893, 804 P.2d 1046, 1048 (1990).

Zybell's objection and ultimately limited Perkins' testimony to her observations. Perkins subsequently testified:

The most striking behavior, as I was getting ready to say a minute ago, is agitated behavior which according to--and I'm not making a diagnosis, but according to the DSM-4, which is a diagnostic and statistical manual, fourth revised edition, that is used by mental health professionals, it describes in children, when they have been exposed to a traumatic event, their behaviors can be agitated.

She then went on to describe her observations of the victim's behavior. We have determined that the district court properly sustained Zybell's objection and limited its consideration of Perkins' testimony. Because Zybell failed to demonstrate a miscarriage of justice or substantial prejudice, we conclude Perkins' testimony was at most a harmless error.¹²

Fifth, Zybell contends that the district court erred when it sentenced him to a term of life instead of a definite term of 20 years. We have consistently afforded the district court wide discretion in its sentencing decisions,¹³ and we have refrained 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."¹⁴ Zybell has not demonstrated that the district court relied upon impalpable or highly suspect evidence. The sentence imposed falls within the

¹²See NRS 178.598; Phenix v. State, 114 Nev. 116, 119, 954 P.2d 739, 740 (1998).


¹³See Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987).


¹⁴Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).


parameters of NRS 200.366, and Zybell failed to demonstrate that NRS 200.366 is unconstitutional. Therefore, we conclude that the district court did not err when it sentenced Zybell to a term of life in prison with the possibility of parole.

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

ORDER the judgment of the district court AFFIRMED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. John M. Iroz, District Judge
Mary Lou Wilson
Attorney General Brian Sandoval/Carson City
Humboldt County District Attorney
Humboldt County Clerk