IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW DAVID FUGATE,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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No. 69925

FAST TRACK RESPONSE

1. Name of party filing this Fast Track Response: The State of Nevada.

2. Name, address and phone number of attorney submitting this Fast Track Response: Terrence P. McCarthy, Chief Appellate Deputy, Washoe County District Attorney's Office, P. O. Box 11130, Reno, Nevada 89520; (775) 328-3200.

3. Name, address and phone number of appellate counsel if different from trial counsel: See Number 2 above.

4. Proceedings raising same issue: None.

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5. Procedural history:

This is an appeal from a judgment of conviction following a jury verdict in which Appellant Fugate was found guilty of violating the terms of Lifetime Supervision imposed on a sex offender. He was convicted of a sexual offense in 2003, with the special sentence of lifetime supervision. The Parole Board set the condition, including the condition that he must not be with a child in a "secluded environment" without another adult that was not a convicted sex offender. 3 AA 734 (Item 18).[1] The court imposed sentence in this case and in another case that is the subject of Docket No. 69926. This appeal followed.

6. Factual background:

The defendant was found on USA Parkway in Storey County with a 15- year-old boy in his full size pick-up truck. 2 AA 433. The only business in the area is a gas station. 2 AA 423. The defendant was stopped by a deputy sheriff because he went out the "in" path of the gas station. The

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[1]It appears that the appendices have been mislabeled. The record of the case in Docket No. 69925 has been filed under Docket No. 69926, and vice versa.

officer testified that he could not see the child in the truck until he came alongside the truck. 2 AA 433.

7. Issues on appeal:

A. Where a defendant pleads not guilty and does not stipulate to his prior convictions, and his prior conviction is an element of the offense, it is not error to allow evidence of the conviction.

B. There was no prejudicial misconduct.

C. The elements of the crime are sufficiently definite.

D. If anyone had moved to disqualify the judge, it would not have been error to deny that motion.

8. Legal argument:

A

Appellant first contends that it was error to allow the jury to receive the evidence that he was a convicted sex offender. He contends that the sole issue in this case is whether the area constituted a secluded environment. That is patently incorrect. "When a defendant pleads not

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guilty, he puts all the elements of the offense at issue. *Sonner v. State*, 112 Nev. 1328, 1338-39, 930 P.2d 707, 714 (1996), *on reh'g in part*, 114 Nev. 321, 955 P.2d 673 (1998). That is, the State was required to show that the defendant was a convicted sex offender that had the special sentence of lifetime supervision. The State was also required to show that the defendant was the same person who was convicted in 2003.

Fugate cites to *Old Chief v. United States*, 519 U.S. 172 (1997), for the undisputed proposition that it can be error to allow evidence of a prior conviction, as an element of the offense, where the defendant offers to stipulate to the elements concerning the prior conviction. Fugate, however, did not offer to stipulate. He pleaded not guilty and contested each element. If the State had not proved the prior conviction, then he would have been entitled to an acquittal.

B

Fugate next contends that his conviction must be set aside because of certain comments by the prosecutor. The first comment, found at 3 AA 601, included the phrase "he's not denying it." That drew an objection and the prosecutor explained that he was merely responding to the portion of

the defense argument in which defense counsel agreed that the testimony of the initial Storey County Deputy was trustworthy. *See* 3 AA 593. The court accepted that explanation, but reminded the jury that the State must prove each element, and admonished the prosecutor not to tread too closely to the line. 3 AA 602. The defense was apparently satisfied with that response as they sought no other relief. As no other relief was requested, this Court should find no error in the failure to grant additional relief.

The other comments from the prosecutor drew no objections. Thus, this Court should intervene only if it holds that defense counsel may not decline to object and the trial court is required to intervene even contrary to the decision of defense counsel. "An error is 'plain' if the error is so unmistakable that it reveals itself by a casual inspection of the record." *Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995). Here, the record suggests that the prosecutor was not commenting on post-arrest silence at all, but was instead commenting on the defendant's failure to assert to his parole officer that another parole officer had given him permission to access the internet. That was weeks before any arrest. The

Court might note that there is no presumption of prejudice in the context of plain error. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). On that subject, the Court should note that the comments about talking to the parole officer concerned only the count related to possession of a device to connect to the internet, and the defendant was acquitted of that count. That would seem to negate any claim of prejudice.

As the comments drew no objection, and led to an acquittal, and did not concern post-arrest silence, this Court should find no error, plain or otherwise.

C

The conditions of lifetime supervision are set by the Parole Board. *Coleman v. State*, 130 Adv. Op. No. 22, 321 P.3d 863 (2014). The conditions in this case included some conditions that are routinely imposed as conditions of parole in cases of sex offenders. *See* NRS 213.1245(K). That is, it was a separate crime for Fugate to be in a "secluded environment" with a child without the presence of another adult who was not a sex offender. The jury was instructed on the issue with some additional detail. 2 AA 298.

The State assumes the correctness of the proposition that terms of lifetime supervision (as creating a separate offense) must meet the same standards as other criminal laws. That is, they must be sufficiently definite that a person of ordinary intelligence can determine what is proscribed. "But constitutional vagueness analysis does not treat statutory text as a closed universe. Enough clarity to defeat a vagueness challenge may be supplied by judicial gloss on an otherwise uncertain statute." *State v. Castaneda*, 126 Nev. 478, 483, 245 P.3d 550, 553 (2010), *opinion modified on denial of reh'g*, No. 52911, 2010 WL 5559401 (Nev. Dec. 22, 2010). In addition, where one engages in clearly proscribed misconduct, one may not be heard to complain that the law is vague as applied to others. *Sheriff of Washoe Cty. v. Martin*, 99 Nev. 336, 340, 662 P.2d 634, 637 (1983).

Here, Fugate focuses on the roadway and the fact that the ultimate goal might have had other people around, but ignores the most important detail; he was in a truck with a 15 year old boy, on a rural Storey County Road.[2] An interested observer, the deputy sheriff assigned to patrol that

[2]The child was also a victim in the related case, Docket No. 69926, in which Fugate pleaded guilty to other sexual crimes against the same victim and that boy's brother.

part of Storey County, was unable to detect the presence of the child until he stopped the vehicle and walked up alongside the driver's door to ask for a license and such. 2 AA 433. That would seem to be a secluded environment. The State also contends that not only could people of reasonable intelligence reach that same conclusion but that Fugate himself reached that same conclusion. When the deputy pulled the truck over, Fugate told the child to stay in the truck and stay quiet. He also later explained to the child that he was not allowed to be alone with him under those circumstances. 2 AA 413-414. Indeed, Fugate made the same admission to his parole officer and he apologized and claimed that he simply forgot who he was. 2 AA 483-484. So, it appears that Fugate himself was able to discern that his conduct was prohibited. Therefore, this Court should declare that the rules imposed by the Parole Board were not unconstitutionally vague and the instructions of the district court were correct.

D

Fugate also contends that there was a breach of the plea bargain in the companion case, and that consequently the trial judge must have had

some sort of bias against Fugate. The logic is obscure. The instant case involved no plea bargain and the State was free to argue for any lawful sentence, and the sentence that was imposed was indeed a lawful sentence. Nevertheless, on the subject of bias, the State first notes that there is nothing in the transcripts revealing any bias, and the Fast Track Statement mentions nothing demonstrating any bias. So, if Fugate had requested recusal, it would not have been error to deny that request. Furthermore, the Supreme Court has ruled that "The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it: 'Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render

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decisions.'" *Liteky v. United States*, 510 U.S. 540, 550-51, 114 S. Ct. 1147, 1155 (1994)(citation omitted).

As to the notion that the sentence is just too dang high, the State must disagree. This defendant has shown that he is and will continue to be a scourge on society. His sentence of 28 to 72 months is shockingly lenient. A sentence within the statutory limits is not 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. *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996). Where the relevant statute concerns recidivist sex offenders who prey on children, this Court should rule that the sentence is too low, although the State has no remedy.

9. Preservation of issues:

The issues have been preserved with the exception of the claim of misconduct in argument.

DATED: June 9, 2016.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

BY: TERRENCE P. McCARTHY
Chief Appellate Deputy

VERIFICATION

1. I hereby certify that this fast track response complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this fast track response has been prepared in a proportionally spaced typeface using Corel WordPerfect X3 in 14 Georgia font. However, WordPerfect's double-spacing is smaller than that of Word, so in an effort to comply with the formatting requirements, this WordPerfect document has a spacing of 2.45. I believe that this change in spacing matches the double spacing of a Word document.

2. I further certify that this fast track response complies with the page- or type-volume limitations of NRAP 3C(h)(2) because it does not exceed 10 pages.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track

response is true and complete to the best of my knowledge, information and belief.

DATED: June 9, 2016.

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CERTIFICATE OF MAILING

Pursuant to NRAP Rule 25, I hereby certify that I am an employee of the Washoe County District Attorney's Office and that on June 9, 2016, I deposited for mailing at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

Karla K. Butko, Esq.
P.O. Box 1249
Verdi, NV 89439

Destinee Allen
Washoe County District Attorney's Office