IN THE SUPREME COURT OF THE STATE OF NEVADA

JONATHAN QUISANO Appellant, v. THE STATE OF NEVADA, Respondent.	Electronically Filed Mar 09 2015 03:11 p.m. Tracie K. Lindeman CASE NO: 66816 Clerk of Supreme Court

FAST TRACK RESPONSE

1. Name of party filing this fast track response: The State of Nevada

2. Name, law firm, address, and telephone number of attorney submitting this fast track response:

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3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:

Same as (2) above.

4. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal: None.

5. Procedural history.

On December 4, 2013, the State charged Jonathan Quisano ("Defendant") by way of Amended Information with an open count of Murder for the death of Defendant's three year old son Khayden. Vol. 2 Appellant's Appendix ("__ AA") 465-67. On June 10, 2014, pursuant to negotiations, Defendant entered into a Guilty

Plea Agreement with the State, wherein he agreed to plead guilty to one count of Voluntary Manslaughter and one count of Child Abuse, Neglect, or Endangerment with Substantial Bodily Harm. 5 AA 1000-1008. A Second Amended Information was filed in open court reflecting the Guilty Plea Agreement the same day. On November 7, 2014, following a sentencing hearing, Defendant was sentenced to a maximum of 120 months with a minimum of 48 months imprisonment in the Nevada Department of Corrections with respect to Count 1, and a maximum of 230 months with a minimum of 72 months with respect to Count 2. 5 AA 1166-67. Count 2 was to run consecutive to Count 1, and Defendant received 488 days credit for time served. Id. The instant appeal followed.

6. Statement of Facts.

Defendant pleaded guilty to Voluntary Manslaughter and Child Abuse, Neglect or Endangerment with Substantial Bodily Harm following the death of his three year old son. 5 AA 1000-1008. At Defendant's sentencing hearing, the defense presented the victim impact testimony of Defendant's wife, Christina Rodrigues. 5 AA 1170-78. However, the defense failed to provide notice to both the district court and the State that Ms. Rodrigues would be called as a victim impact speaker. Id. at 1177. As such, the State was unaware that she would speak until shortly before the sentencing hearing began. Id.

During her statement, Ms. Rodrigues indicated that she hoped the court would sentence Defendant to probation, rather than prison time. Id. at 1172. At the conclusion of her statement, the State cross-examined Ms. Rodrigues. Id. To counter Ms. Rodrigues' request that Defendant receive mere probation for the death of a child, the State impeached Ms. Rodrigues with an affidavit containing a statement Ms. Rodrigues made in a prior proceeding in Family Court, in which she stated Defendant should go to prison for his abuse of Khayden. Id. at 1173. Prior to this impeachment, the State had not planned on using, or been aware that it would need to use, the affidavit in any proceedings in the case at bar. Id. at 1177-78. As such, the State did not provide a copy of the affidavit to the defense prior to sentencing. Id. at 1176.

Various broadcast media outlets from the Las Vegas area were also present at the hearing, including the Las Vegas Review Journal. 7 AA 1515-16. Defense counsel objected to the Review Journal's presence, based on the fact that the Review Journal had not made a prior written request to film the proceedings. Id. The court indicated that had the Review Journal made such a request, the court would have approved it just as it had approved the requests from the other media outlets. Id. at 1518. The court explained its decision to permit the Review Journal reporter to stay in the courtroom, and when it asked defense counsel what possible prejudice that presented, defense counsel replied "[t]here isn't any." Id.

7. Issue(s) on appeal.

Whether Defendant received a fair sentencing hearing wherein the State briefly cross-examined the victim impact speaker regarding a prior statement, and a media outlet was permitted to record the proceedings without first filing a written request to do so.

8. Legal Argument, including authorities:

I. DEFENDANT WAS GIVEN A FAIR SENTENCING HEARING AND IS THEREFORE NOT ENTITLED TO A NEW SENTENCING

Defendant raises several claims of error arising from his sentencing hearing, and contends that as a result, he is entitled to be sentenced anew. This Court has held that a district court is granted wide discretion to impose an appropriate sentence. Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996). This Court will disturb a district court's sentencing decision only if the sentence was based *solely* on impalpable and highly suspect evidence. Id. In the instant matter, the record is void of any indication that the district court relied on any suspect or impalpable evidence whatsoever. Therefore, and because Defendant received a fair sentencing hearing free of error or undue prejudice, his sentence should be upheld.

A. No Brady Material Was Proffered at Defendant's Sentencing and Defendant Therefore Suffered No Prejudice.

Defendant first contends that by using an affidavit not previously disclosed to the defense while cross-examining Ms. Rodrigues, the State suppressed exculpatory

impeachment evidence in violation of discovery standards set forth in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). However, because the evidence in question was not Brady material, and because the State is not required to disclose impeachment evidence before a guilty plea is entered, no error occurred.

As discussed above, Defendant failed to provide notice to the court or the State that Ms. Rodrigues would speak as a victim impact witness. Id. at 1177. During her statement, Ms. Rodrigues stated she thought Defendant should be sentenced to probation. Id. at 1172. The State then confronted her with her prior statement that Defendant committed the child abuse at issue and should go to prison. Id. at 1174-75. Defense counsel complained that the affidavit containing the impeaching statement had not been produced by the State during discovery. Id. at 1176. The State responded that due to Defendant's lack of notice regarding the speaker, the State was unaware it would use the previous statement to impeach the speaker. Id. at 1177. The court found that therefore, the State's use of the affidavit did not violate discovery rules. Id.

Defendant's interpretation of what constitutes "impeachment evidence" requiring disclosure under Brady is flawed. While it is true that Brady requires that the State disclose exculpatory or impeachment evidence, "impeachment" evidence in this context generally refers to evidence *useful to a defendant* in impeaching a government witness where "reliability of [the] witness may well be determinative of

guilt or innocence," i.e., "a promise made to the key Government witness that he would not be prosecuted if he testified for the Government." United States v. Bagley, 473 U.S. 667, 676-77, 105 S.Ct. 3375, 3380-81 (1985); see also Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 766 (1972). As this authority makes clear, contrary to Defendant's reasoning, Brady does not require disclosure of all evidence the State may possibly employ to impeach a defense witness at any time.

In the instant matter, the affidavit was plainly not the sort of impeachment evidence contemplated in Brady. Ms. Rodrigues' personal wish that Defendant be sentenced to prison for the death of her young son was in no way determinative of Defendant's guilt or innocence. Moreover, because Defendant had already pleaded guilty, his guilt or innocence was no longer at issue and the credibility of his wife's testimony was therefore of no consequence with respect to that determination. Further, the alleged impeachment evidence would not have been useful to Defendant, as Ms. Rodrigues' desire that Defendant go to prison is not exculpatory.

Finally, even if the affidavit can be characterized as impeachment information under Brady, the State is simply not required to disclose impeachment information to a defendant before he enters a guilty plea. United States v. Ruiz, 536 U.S. 622, 629, 122 S.Ct. 2450, 2455 (2002). In reaching this conclusion, the United States Supreme Court noted that "it is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware

prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant." Id. at 630, 2546. Accordingly, because Defendant entered a guilty plea, at no time was the State obligated to disclose any impeachment evidence it may have possessed. As such, this claim of error is erroneous and Defendant's sentence should stand.

B. The Content of the Victim's Impact Statement Was Appropriate Under NRS 176.015 and Was Not Suspect or Impalpable Information.

Defendant next complains that the victim impact speaker's alleged discussion of Defendant's prior instances of child abuse, pursuant to the State's cross-examination, amounted to "suspect and impalpable" information which exceeded the permissible scope of a victim impact statement, and therefore prejudiced Defendant. Because this claim is belied by the record, and this Court has found such discussion is in fact within the scope of a victim impact statement, this claim should be rejected.

Pursuant to NRS 176.015(6), a sentencing court has the authority to consider any reliable and relevant evidence at the time of sentencing. The statute also provides that a sentencing court "shall afford the victim the opportunity to…reasonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution." Id. at (3). With respect to the victim's views concerning the defendant, this Court has held that, "'[v]iews' on the defendant clearly encompass opinions as to the defendant's general character. Since

an assessment of character usually turns in part on prior acts, this language permits some reasonable discussion of prior acts by the defendant." Buschauer v. State, 106. Nev 890, 893, 804 P.2d 1046, 1048 (1990). This Court also presumes that a sentencing court "is capable of listening to the victim's feelings without being subjected to an overwhelming influence by the victim in making its sentencing decision." Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993). In a non-capital case, a victim may also appropriately express an opinion regarding the defendant's sentence pursuant to NRS 176.015. Id.

As discussed above, the State briefly cross-examined Ms. Rodrigues. In doing so, the prosecutor stated: "[a]t the family court proceeding, you said that you believed [Defendant] had committed abuse against your son Khayden, that he should be punished for this crime and that he should go to prison." 5 AA 1174-75. This was the extent of the State's discussion of child abuse by Defendant. As is clear, the State was referring only to the incident of abuse for which Defendant was charged in this matter, and not "allegations of prior abuse" unrelated to the case at bar. At no time during its cross-examination did the State inquire about previous instances of abuse unrelated to this case. See Id. at 1172-78.

The State's questioning of Ms. Rodrigues was plainly within the scope of a victim impact statement permitted by this Court, and in no way constituted "suspect and impalpable" information. The State simply did not inquire about instances of

prior abuse as Defendant alleges, and even if it had, this Court has found that such inquiry would be permissible. Moreover, the State did not exceed the proper scope when it inquired as to the victim's opinion on what Defendant's sentence should be, as such inquiry is also plainly permitted by this Court. Therefore, the State elicited no inappropriate information, and this claim should be rejected.

C. The District Court Properly Permitted a Media Outlet to Record the Proceedings, and No Error or Prejudice Resulted.

Finally, Defendant alleges that the district court's decision to allow the Las Vegas Review Journal to provide electronic media coverage of his sentencing somehow warrants a new sentencing hearing. Because Defendant can point to no prejudice or error resulting from the Review Journal's presence, this claim is without merit.

At the outset of Defendant's sentencing hearing, defense counsel objected to the presence of a reporter with a television camera from the Review Journal, making no argument other than the fact that the reporter had not filed a written request to electronically cover the proceeding. 7 AA 1517. The court indicated that it had already approved written requests from two other media outlets, and had the Review Journal filed such a request, the court would have approved that request as well. Id. at 1518. The court noted that there no prejudice to Defendant created by the Review Journal's presence. Id. When the court asked what prejudice could possibly exist,

defense counsel responded "[t]here isn't any…There isn't actual prejudice other than that they shouldn't benefit from not following the rules…" Id.

Pursuant to this Court's rule, "there is a presumption that all courtroom proceedings that are open to the public are subject to electronic coverage." SCR 230(2). For this reason, although a written request by a media outlet is generally required in advance before such outlet may provide electronic coverage of a proceeding, a judge may grant an untimely request or waive the request requirement entirely. Id. at (1). Generally, a judge should make particularized findings on the record regarding whether electronic coverage will be permitted. Id. In making this decision, a judge should consider six factors enumerated in SCR 230(a)-(f). Id. The rule does not indicate a requirement that a judge explicitly discuss each factor on the record, but only that the factors be considered by the judge in determining whether to allow media coverage. See Id.

In the instant matter, following defense counsel's objection to the Review Journal's presence in the courtroom, the court specifically articulated its reasons for allowing the Review Journal to remain despite a lack of written request:

> "…the benefit isn't to the [Review Journal] itself, the benefit is to the public because they're able to see the proceedings and, you know, we obviously encourage you know, public oversight of everything that occurs during the proceeding, and so in that way, there's a greater…public good in allowing the [Review Journal] and other media outlets to be here, at least in theory.

> So, in view of that, I am gonna note your objection. Like I said, if you had some kind of actual prejudice, I would certainly grant your request to exclude the [Review Journal], but I don't really see a reason to do that. So, they're allowed to stay." 7 AA 1518-19.

Thus, although the court did not specifically discuss the factors enumerated in SCR 230, the court did articulate a reasoned decision for waiving the written notice of SCR 230. Moreover, Defendant has failed to demonstrate that the court's decision in any way prejudiced him or affected the proceedings, and as mentioned, in fact admitted that the Review Journal's presence caused no prejudice. As such, this claim should be rejected and Defendant's sentence should stand.

Because Defendant has failed to establish that he received an unfair sentencing hearing in that he has not demonstrated that the district court relied on suspect or impalpable information, the State respectfully requests that this Court deny Defendant's appeal.

9. Preservation of the Issue.

The State recognizes that each issue raised was preserved by objection during sentencing proceedings.

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 Microsoft Word 2013 in 14 point and Times New Roman style.
2. I further certify that this Fast Track Response complies with the type-volume limitations of NRAP 32(a)(8)(B) because it is proportionately spaced, has a typeface of 14 points and contains 2,446 words.
3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and 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 this 9th day of March, 2015.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Steven S. Owens*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 9, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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BY */s/ E.Davis*
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