

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA SHUE,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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Case No. 67428

RESPONDENT'S SUPPLEMENT TO ANSWERING BRIEF

**Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County**

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STATEMENT OF THE ISSUE

Whether any error under Castaneda v. State, 132 Nev. Adv. Op. 44, __ P.3d __ (2016), was not plain.

STATEMENT OF THE CASE

The State incorporates by reference the Statement of the Case from the Respondent’s Answering Brief. (Respondent’s Answering Brief (RAB), p. 2-3).

Additionally, Appellant requested that this Court order supplemental briefing. (Appellant’s Motion to Supplement his Opening Brief, filed July 1, 2016). The State opposed this request. (Opposition to Motion to Supplement Appellant’s Opening Brief, filed July 5, 2016). This Court directed the parties to file supplemental briefing. (Order Granting Motion, filed July 7, 2016). Appellant supplemented his

brief on July 19, 2016. (Appellant's Supplement to his Opening Brief Supplemental Points and Authorities (Appellant's Supplemental Brief), filed July 19, 2016).

STATEMENT OF THE FACTS

The State incorporates by reference the Statement of the Facts from the Respondent's Answering Brief. (Respondent's Answering Brief (RAB), p. 3-7).

SUMMARY OF THE ARGUMENT

Appellant's failure to raise this issue before the trial court amounts to a waiver. To the extent this Court considers the claim, Appellant fails to demonstrate plain error. The facts of this case clearly demonstrate that the images related to H.I. and C.I. were created by Appellant on different dates and times and as such there is no error under Castaneda v. State, 132 Nev. Adv. Op. 44, __ P.3d __ (2016). Nor is any error related to the images of two unknown males juveniles plain since the parties were unaware of the need to make a record on this issue.

ARGUMENT

II. ANY ERROR UNDER CASTANEDA v. STATE, 132 NEV. ADV. OP. 44, __ P.3d __ (2016), WAS NOT PLAIN

Shue concedes he failed to raise this argument below. (Appellant's Supplemental Brief, p. 9-10). That failure waives all but plain error. Martinorellan v. State, 131 Nev. __, __, 343 P.3d 590, 593 (2015); Maestas v. State, 128 Nev. __, __, 275 P.3d 74, 89 (2012); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003);

Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 948, 987 (1995); Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995). Plain error review asks:

“To amount to plain error, the ‘error must be so unmistakable that it is apparent from a casual inspection of the record.’” Vega v. State, 126 Nev. ___, ___, 236 P.3d 632, 637 (2010) (quoting Nelson, 123 Nev. at 543, 170 P.3d at 524). In addition, “the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing ‘actual prejudice or a miscarriage of justice.’” Valdez, 124 Nev. at 1190, 196 P.3d at 477 (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003))). Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.

Martinorellan, 131 Nev. at ___, 343 P.3d at 594.

Images of H.I. and C.I.

Castaneda is not relevant to the sexual victimization of these two children. Factually, in Castaneda, “[t]he State prosecuted the images as a group and did not attempt to show, other than that there were 15 different images, individual distinct crimes of possession.” 132 Nev. Adv. Op. 44 at p. 15, ___ P.3d at ___. Unlike Castaneda, Appellant created the child pornography by setting up a hidden camera that captured sexual images of two children on different dates. The facts of this case make it clear that the child pornography was created by Appellant, and thus possessed by Appellant, on different dates during different incidents. H.I. viewed all of the videos of her and her brother and repeatedly said they related to different dates and thus different incidents. 6 Appellant’s Appendix (AA) 1040-42, 1050, 1052, 1053, 1055, 1057, 1058, 1060, 1062, 1067, 1069, 1070, 1071-72, 1073, 1075-

76, 1077, 1078, 1079, 1080, 1081, 1082, 1083. Indeed, Appellant was captured by his own hidden camera setting up and manipulating the camera on multiple occasions. 6 AA 1046, 1049, 1058, 1066, 1068, 1073-74, 1079, 1081-82.

Castaneda indicated it was not deciding the issue presented here: “This case does not require us to decide whether distinct downloads at different times and in different locations would establish separate units of prosecution as some courts have held.” 132 Nev. Adv. Op. 44 at p. 15, ___ P.3d at ___. Unlike Castaneda, the facts at trial made it clear that Appellant’s hidden camera captured, thereby creating and possessing, distinct images from different times and incidents. 6 AA 1040-42, 1050, 1052, 1053, 1055, 1057, 1058, 1060, 1062, 1067, 1069, 1070, 1071-72, 1073, 1075-76, 1077, 1078, 1079, 1080, 1081, 1082, 1083.

Appellant attempts to escape the stark factual contrast between Castaneda and his victimization of H.I. and C.I. through misapplication of Wilson v. State, 121 Nev. 345, 114 P.3d 285 (2005). Similarly to Castaneda, Wilson is factually distinguishable from Appellant’s repeated violation of H.I. and C.I. Wilson was charged and convicted of “four counts of using a minor in the production of pornography and four counts of possession of a visual presentation depicting sexual conduct of a person under 16 years of age.” Wilson, 121 Nev. at 350, 114 P.3d at 289. However, all of these offenses arose from a single event where Wilson took multiple photographs of his victim in quick succession. Id. at 349-50, 114 P.3d at

288-89. Unlike, Castaneda and Wilson, H.I. clearly indicated that each image of her and her brother arose from a separate and distinct incident. 6 AA 1040-42, 1050, 1052, 1053, 1055, 1057, 1058, 1060, 1062, 1067, 1069, 1070, 1071-72, 1073, 1075-76, 1077, 1078, 1079, 1080, 1081, 1082, 1083.

Appellant ultimately relies upon Wilson for the unremarkable, and in the context of this case, irrelevant point of law that “[t]he crime of possession of child pornography is not a lesser-included offense to the production of child pornography[.]” (Appellant’s Supplemental Brief, p. 6 (quoting, Wilson, 121 Nev. at 359, 114 P.3d at 295)). However, Appellant’s focus on this double jeopardy holding is inexplicable because the starting point in any double jeopardy analysis is whether the charges arise out of the same incident. Wilson, 121 Nev. at 358, 114 P.3d at 294. If they do not, there is no double jeopardy issue. In this matter, it is undisputed that the images related to the counts associated with H.I. and C.I. arose from separate and distinct incidents. 6 AA 1040-42, 1050, 1052, 1053, 1055, 1057, 1058, 1060, 1062, 1067, 1069, 1070, 1071-72, 1073, 1075-76, 1077, 1078, 1079, 1080, 1081, 1082, 1083.

Appellant’s attempt to thread the square peg of his sexual victimization of H.I. and C.I. through the round hole of Castaneda must fail due to the specific facts of this case. Appellant created the images of H.I. and C.I. during different incidents through the use of his hidden camera. 6 AA 1040-42, 1050, 1052, 1053, 1055, 1057,

1058, 1060, 1062, 1067, 1069, 1070, 1071-72, 1073, 1075-76, 1077, 1078, 1079, 1080, 1081, 1082, 1083. Appellant wants this Court to judge possession based upon when those images were uploaded to his laptop, however, Appellant was in possession of those images from the moment he captured them on his hidden camera. See, Palmer v. State, 112 Nev. 763, 768, 920 P.2d 112, 115 (1996) (“A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person, who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.”).

Images of Two Unknown Male Juveniles

Any error related to these images does not rise to the level of plain error. As Appellant points out, Castaneda was “not controlling law during Appellant’s trial[.]” (Appellant’s Supplemental Brief, p. 9). As such, the trial court, prosecution and defense were unaware that a record would need to be created regarding whether Appellant simultaneously possessed these images or whether they were downloaded to his laptop at different times. Castaneda, 132 Nev. Adv. Op. 44 at p. 15, __ P.3d at __. Further, should this Court be concerned that any error might rise to the substantial level of plain error, the only appropriate response is remand for the creation of a record regarding whether these images were downloaded on to

Appellant's laptop at different times. See, Ryan's Express Transp. Servs. v. Amador Stage Lines, Inc., 128 Nev. __, __, 279 P.3d 166, 172-73 (2012). Indeed, in response to a juror question, Detective Ramirez indicated that it was possible to determine the download dates of the pictures on the laptop but that he did not have access to the file paths in court as they were not printed on the exhibits. 5 AA 918-19.

CONCLUSION

For the foregoing reasons, the State respectfully requests that Shue's Judgment of Conviction be AFFIRMED.

Dated this 21st day of July, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page limitations of NRAP 32(a)(7) and Nevada Supreme Court Order dated July 17, 2016, because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 1,465 words and does not exceed 10 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 21st day of July, 2016.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July 21, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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