IN THE SUPREME COURT OF THE STATE OF NEVADA

B.J. W.-A.,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 83621
c/w 84276

RESPONDENT'S ANSWERING BRIEF

Appeal From Certification Order
Eighth Judicial District Court, Clark County

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RESPONDENT'S ANSWERING BRIEF

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STATEMENT OF THE ISSUES

1. Whether Labeling Lewd Conduct with a Child Under the Age of 14 as a Delinquent Act Does Not Preclude the Allegation from Certification
2. Whether Appellant's Claim is Belied by the Plain Meaning of NRS 201.230
3. Whether the Legislative History of NRS 201.230 Does Not Support Appellant
4. Whether the Facts Support Appellant's Certification
5. Whether Appellant's Lenity Claim was Waived and NRS 201.230 is Unambiguous
6. Whether the District Court Did Not Violate the Separation of Powers Doctrine

STATEMENT OF THE CASE

On September 1, 2021, B. Joshua W-A ("Appellant") was charged with five (5) counts of LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Felony). 1 ROA at 1-3.

On September 3, 2021, the State filed its Certification Petition. 1 ROA at 4-15. Appellant filed his Opposition on September 10, 2021. 1 ROA at 37-44.

On September 16, 2021, Juvenile Court heard argument from the State and Appellant and certified Appellant as an adult for the present charges. 1 ROA at 87-97. Juvenile Court filed its Certification to Adult Status Order on September 21, 2021. 1 ROA at 100-102.

On November 19, 2021, Appellant filed a Motion for the Court to Accept Jurisdiction Under NRS 62B.390(5)(c), Exceptional Circumstances to Certification, Because the Offenses Charged May Only be Prosecuted as Delinquent Acts and Therefore Are Not Certifiable for Criminal Proceedings.1 ROA at 108-127. The State filed its Opposition on December 6, 2021. 1 ROA at 136-150. Appellant filed his Reply on December 9, 2021. 1 ROA at 181-187.

On December 16, 2021, Juvenile Court heard argument from Appellant and the State regarding the motion. 1 ROA at 188-209. Juvenile Court denied Appellant's motion on December 22, 2021. 1 ROA at 210-211. The Certification Hearing Report was filed on December 30, 2021. 1 ROA 223-228.

On November 22, 2021, Juvenile Court filed an Amended Certification Petition. 1 ROA 131-133. On January 28, 2022, the Second Amended Certification Petition was filed. 1 ROA at 231-235.

On February 8, 2022, a Finding of Probable Cause and Transportation Order for a Certified Adult was filed. 1 ROA at 271-274. On February 15, 2022, Appellant filed a Notice of Appeal. 1 ROA at 282-284. Appellant filed his Opening Brief ("AOB") on March 11, 2022.

On March 1, 2022, Appellant filed a Motion to Consolidate Cases No. 83621 and 84276 for Direct Appeal and Request for Expedited Decision. The underlying district court case in both appeals arises out of a petition alleging counts one through five, and an amended petition alleging counts six through eight. Appellant was certified as an adult for all eight counts, but the Court filed two separate Certification Orders, one for counts one through five, and another for counts six through eight. A Notice of Appeal was filed from each Certification Order but docketed in two separate cases. Appellant's Motion was granted on March 3, 2022.

STATEMENT OF THE FACTS

Juvenile Court relied on facts presented by the Certification Hearing Report filed on December 30, 2021:

> On May 23, 2021, Las Vegas Metropolitan Police Department responded to a call for service regarding possible lewdness with a minor. Details of the call stated the person reporting recently learned that their 14-year-old daughter had possible been sexually touched by her 18-year-old half-brother. Byron is the suspect, but his family call him by his middle name, Joshua.
>
> Upon arrival, Officers made contact with the person reporting the alleged sexual abuse. The reported stated that

his 14-year-old daughter disclosed her half-brother, Byron, has been rubbing his penis on her thighs while she sleeps. This has been occurring for the past 7 years and last occurred in the beginning of 2020. The arresting Officers spoke with the victim and she stated she remembers Byron began rubbing his penis on her thighs when she was 7 years old. She said Byron would do it as often as he could. She would wake up with Byron on top of her with his pants down and his penis exposed. She would pretend to be asleep during the acts because she was scared and didn't know what to do. Byron would rub his penis on her thighs until he ejaculated on the bed sheets and then would get back up and leave the room. She mentioned she never felt any type of penetration. According to the victim, the acts stopped when she told Byron she had a boyfriend. Byron never threatened her in any manner, and she did not tell her parents because she was afraid. The person reporting also reported that his 5-year-old daughter was possibly inappropriately touched as well.

During a forensic interview, the 5-year-old victim reported that Byron did something to her vagina. She did not want to tell the interviewer what Byron did to her vagina. Byron told her to keep a secret. Byron also told her to be quiet.

There is a third victim that was reported, which is another half-sister that is currently 13 years old. Byron's stepmother asked her if anything happened between her and Byron. She reported Byron would try several times to get on top of her, but she would fight him back and he never penetrated her. Byron would physically hit her because she did not comply with what he was trying to do. The third victim reported the first time Byron tried something inappropriate was approximately 5 years ago. During the third victim's forensic interview, she reported that Byron first touched her when she was 10 years old until she was 13. She reported that Byron would pull on her shorts and would also touch her chest. Byron touched her vagina under her clothing, with skin-to-skin contact. The third victim reported there were several other

> incidents where Byron would try and touch or pull-down her underwear. She was not sure how many times Byron touched her, but it occurred several times. Byron would hit her because he was always angry.

1 ROA at 224-225.

SUMMARY OF THE ARGUMENT

Juvenile Court correctly certified the allegations against Appellant. The Court's decision is supported by the plain meaning of NRS 201.230. The statute is unambiguous and does not preclude a juvenile court from certifying allegations of lewd conduct with a child under the age of 14 against a juvenile. Further, the legislative history supports Juvenile Court's decision to certify the allegations against Appellant. When discussing the statute, the Assembly Judiciary Committee expressed concern about certifying juveniles. However, their concern was related to certification of juveniles who were in a relationship with someone under the age of 14 if they themselves were close in age to the victim. The Committee did not express any concern regarding cases where the circumstances warranted certification, like Appellant's, and did not express interest in precluding courts from certifying all lewd conduct cases against juveniles. In this case, Appellant's crimes warranted certification.

Appellant claimed Juvenile Court failed to consider a more lenient statutory interpretation of NRS 201.230. However, that claim fails because Appellant waived

the claim by failing to raise it below, and the statute is not ambiguous, so the rule of lenity does not apply.

Lastly, Juvenile Court did not violate the separation of powers doctrine, as it is well-established that it is the function of the judiciary to interpret and subsequently apply statutes.

ARGUMENT

Appellant challenges Juvenile Court's reading of the specific provisions of NRS 201.230 relative to the authority to certify juveniles for adult proceedings pursuant to NRS 62B.390.

Procedural decisions are reviewed for an abuse of discretion. See Zupancic v. Sierra Vista Recreation, Inc., 97 Nev. 187, 192, 625 P.2d 1177, 1180 (1981). A juvenile court's decision to certify an accused to answer in adult court is reviewed for an abuse of discretion. In re Eric A.L., 123 Nev. 26, 33, 153 P.3d 32, 36–37 (2007). An "abuse of discretion" occurs if a court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. Id. However, questions of statutory construction are reviewed de novo. State v. Sargent, 122 Nev. 210, 213, 128 P.3d 1052, 1054 (2006); City of Reno v. Reno Gazette-Journal, 119 Nev. 55, 58, 119 Nev. 55, 63 P.3d 1147, 1148 (2003).

I. LABELING LEWD CONDUCT WITH A CHILD UNDER THE AGE OF 14 AS A DELINQUENT ACT DOES NOT PRECLUDE THE ALLEGATION FROM CERTIFICATION

A. NRS 201.230 Does Not Limit the Court's Ability to Certify Lewd Conduct

Appellant claims Juvenile Court's interpretation of NRS 201.230 is incorrect because the allegations against him were not certifiable. AOB at 11-22. He contends the fact that NRS 201.230(2)-(4) was written to specifically exclude juvenile conduct from the enumerated penalties for adult conduct. Id. However, this claim is a clear misrepresentation of the actual language of the statute and ignores other relevant statutes and legal definitions.

NRS 201.230 simply defines Lewdness with a Minor as a delinquent act when committed by a minor. It does not preclude that minor from being certified. NRS 201.230(5) states, "[a] person who is under the age of 18 years and who commits lewdness with a child under the age of 14 years commits a delinquent act." Nothing in the statute limits the Court's ability to certify the charge.

NRS 201.230(5) applies to individuals under the age of 18. The legal term for this type of individual is "Child." NRS 62A.030(1)(a). Therefore, using the appropriate legal terminology, NRS 201.230 may be read as follows, a child "who commits lewdness with a child under the age of 14 yeas commits a delinquent act."

Virtually all "criminal acts" are delinquent acts when committed by children and fall under the jurisdiction of the Juvenile Court. NRS 62B.330(1-2) states:

> 1. Except as otherwise provided in this title, the juvenile court has exclusive original jurisdiction over a child living or found within the county

who is alleged or adjudicated to have committed a delinquent act.

2. For the purposes of this section, a child commits a delinquent act if the child: (a) Violates a county or municipal ordinance other than those specified in paragraph (f) or (g) of subsection 1 of NRS 62B.320 or an offense related to tobacco;
(b) Violates any rule or regulation having the force of law; or
(c) Commits an act designated a criminal offense pursuant to the laws of the state of Nevada.

The statute is clear, the Juvenile Court has jurisdiction over delinquent acts which are defined as acts designated as criminal offenses under Nevada law. Nevada classifies such criminal offenses as felonies, gross misdemeanors, and misdemeanors. NRS 193.120. Therefore, when a juvenile commits any "felony" the act is deemed to be a delinquent act. As such, every juvenile delinquency petition filed in Juvenile Court alleges the child has committed a delinquent act, not a criminal felony or misdemeanor.

NRS 201.230(2)-(4) provide the category of felony and criminal penalties associated with Lewdness with a Child. The statutes specifically states that said convictions and penalties do not apply to NRS 201.230(5). There is no contradiction between these statutes and all other statutes governing juvenile matters.

No matter what delinquent act has been committed, a child is never adjudicated on a felony nor is he ever criminally sentenced for a delinquent act. The statute makes this fundamental legal principle abundantly clear when it states that

any juvenile proceeding is "not criminal in nature." NRS 62D.010. Therefore, a child cannot be "adjudicated" on a felony sexual assault, robbery, battery with a deadly weapon or lewdness with a child when committed by a juvenile. Furthermore, none of the criminal statutes relating to sentencing, category of felony, criminal punishment, or required imprisonment apply to delinquent act of sexual assault, robbery, battery with a deadly weapon or any other criminal-like act.

Although a child may never be criminally convicted or punished for a delinquent act, the Legislature provided juvenile courts with the ability to determine if a child's actions require he be tried as an adult and face criminal charges. NRS 62B.390. Furthermore, nothing in the statute prohibits the Court from sentencing a person under 18 years old who has been certified as an adult. NRS 201.230(2) states:

> Except as otherwise provided in subsections 4 and 5, a person who commits lewdness with a child under the age of 14 years is guilty of a category A felony and shall be punished by imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served, and may be further punished by a fine of not more than $10,000.

Therefore, if a person who has been certified is convicted of lewdness with a child under the age of 14, he will be convicted of a category A felony and sentenced according to the statute. This same formula holds true for convictions involving sexual assault, robbery, battery with a deadly weapon or any other criminal act.

/ / /

B. NRS 201.230 is Not an Exception to Standard Juvenile Procedure

Although it is redundant, NRS 201.230 is not an exception to standard juvenile legal procedure. The statute simply restates the rule that children commit delinquent acts and cannot be criminally punished for a delinquent act. Indeed, reading juvenile law and NRS 201.230 collectively clearly permits certification to adult status for the offense of lewdness with a minor.

First, when a person under 18 years old commits offenses, the State alleges they have committed "delinquent acts" not criminal acts. NRS 62B.330(2). Second, the person under 18 is considered a "child" and is therefore under the jurisdiction of the Juvenile Court. NRS 62A.030(1). Third, if the juvenile remains under the jurisdiction of the Juvenile Court he may only be adjudicated for a delinquent act not a criminal offense. NRS 62B.330. Fourth, the Juvenile Court cannot impose any criminal penalties on the juvenile based on the adjudication. NRS 62B.330(3).

These first four basic principles are reiterated in NRS 201.230 which provides that when a child commits the criminal offense of Lewdness with a Minor under 14 he has in fact committed a delinquent act and when a child commits a delinquent act he cannot be convicted of a felony or punished with imprisonment. NRS 62B.330(3). These principles apply to virtually any offense committed by a child. For example, a juvenile is charged with and adjudicated on the delinquent acts of sex assault or

battery with a deadly weapon. That same juvenile cannot be convicted of a felony and sentenced to prison based on the adjudication. NRS 62B.310.

Fifth, the Juvenile Court may determine when an offense is sufficiently serious that the individual should be treated as an adult and face criminal charges. NRS 62B.390. Sixth, if certified the State is allowed to pursue criminal charges against the individual. NRS 62B.390(1). Seventh, if the trier of fact determines beyond a reasonable doubt that the State has met its burden and proved every element, the individual may be convicted and sentenced according to law. Id.

There is nothing in the statute that prohibits the State from seeking certification on the charge of Lewdness with a Child under 14. The statute clearly lays out the elements required to prove that a person under 18 has committed the crime and provides the criminal penalty if convicted. Again, this is no different from all other cases for which a juvenile is certified.

Therefore, labeling lewd conduct with a child under the age of 14 as a delinquent act does not preclude the allegation from certification.

II. APPELLANT'S CLAIM IS BELIED BY THE PLAIN MEANING OF NRS 201.230

Juvenile Court's interpretation of NRS 201.230 and NRS 62B.390 was correct and is supported by the statute's plain meaning.

This Court has repeatedly held that "if the language of a statute is clear on its face, we will ascribe to the statute its plain meaning and not look beyond its

language." Koller v. State, 122 Nev. 223, 226, 130 P.3d 653, 655 (2006) (footnote and internal quotation marks omitted, emphasis added); Accord, Potter v. Potter, 121 Nev. 613, 616, 119 P.3d 1246, 1248 (2005) ("When the language of a statute is clear and unambiguous, its apparent intent must be given effect"); State Dept. of Human Resources, Welfare Div. v. Estate of Ulmer, 120 Nev. 108, 113, 87 P.3d 1045, 1049 (2004) (It is well established that when the language of a statute is plain and unambiguous a court should give that language its ordinary meaning and not go beyond it); Beazer Homes Nevada, Inc. v. Eighth Judicial District Court, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004) (if the plain meaning of a statute is clear on its face the this court will not go beyond the language of the statute to determine its meaning); State v. Catanio, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004) (We must attribute the plain meaning to a statute that is not ambiguous); Diamond v. Swick, 117 Nev. 671, 675, 28 P.3d 1087, 1089 (2001) ("This court has consistently held that when there is no ambiguity in a statute, there is no opportunity for judicial construction, and the law must be followed unless it yields an absurd result. In construing a statute, this court must give effect to the literal meaning of the words."); City Council of City of Reno v. Reno Newspapers, Inc., 105 Nev. 886, 893, 784 P.2d 974, 977 (1989) (When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it).

Appellant claims NRS 201.230(5) declares lewd and lascivious acts committed by a person under the age of 18 "adjudicable exclusively as delinquent acts." AOB at 13. However, a plain reading of the subsection evidences no such exclusivity. The subsection only labels the act as a delinquent act and does not address whether a juvenile court has the authority to waive jurisdiction over a violation. Simply put, there is nothing in the statute that bars certification. Appellant demands that this Court amend NRS 201.230 to judicially impose a bar against certification that is categorically not found in the plain text of the statute. Calling an act a delinquent act does not automatically preclude that allegation from being certified.

Furthermore, Juvenile Court's finding that Appellant's reading of NRS 201.230 would lead to an "absurd" result is justified. 1 ROA at 206. Under Appellant's reading of the statute, any allegation of lewdness with a child under 14 years of age could not be certified, regardless of the surrounding circumstances or aggravating factors. Certification is an essential safety valve designed to hold the worst juvenile offenders who commit egregious and heinous acts "accountable for their criminal acts by referral to the adult criminal justice system." Matter of Seven Minors, 99 Nev. 427, 430, 664 P.2d 947, 949 (1983). For example, under Appellant's reading, a 17 year old who penetrates or attempts to penetrate a 3 year

old can be certified. However, if that same 17 year old has the 3 year old child masturbate him, he cannot be certified. That would be an absurd result.

Lastly, while Appellant argues that he needs rehabilitative treatment instead of incarceration, Juvenile Court will only have jurisdiction over Appellant for one year and 7 months more. A juvenile court can only retain jurisdiction over a child until the child reaches 21 years of age. NR 62B.420. Appellant is currently 19 years of age and will be 20 years of age in October. Appellant will only be able to receive treatment for approximately one and a half years, then Juvenile Court will no longer have jurisdiction and will no longer be able to mandate the treatment Appellant states he needs. One and a half years of treatment is not sufficient for Appellant's proposed rehabilitation, nor does it match the severity of Appellant's crimes. Appellant committed lewd acts upon 3 out of 4 of his half-sisters. 1 ROA at 224-225. As for the oldest sister, Appellant would repeatedly rub his penis on her thighs while she slept and ejaculate on the bed sheets over a period of 7 years, starting when she was 7 years old. Id. Appellant only stopped because she told him she had a boyfriend. 1 ROA at 224.

As for the second oldest sister, Appellant would continuously try to get on top of her and *hit* her if she did not comply. 1 ROA at 225. Appellant would touch her vagina under her clothing, touch her chest, and pull on her shorts. Id. Appellant started this conduct when she was 10 years old and continued until she was 13. Id.

The third and youngest sister reported Appellant "did something" to her vagina but did not want to tell the interviewer what because Appellant told her to keep it a secret and to be quiet. Id.

Appellant committed lewd acts on 3 of his half sisters and committed those acts over a period of multiple years. If Appellant was not certified and was not able to be certified under his interpretation of NRS 201.230, Appellant would only receive one and a half years of his requested treatment. One and a half years of treatment as a penalty for 7 years of sexual abuse on 3 girls is not an administration of justice. Therefore, Juvenile Court was correct in its reading of NRS 201.230 and appropriately certified Appellant.

III. THE LEGISLATIVE HISTORY OF NRS 201.230 DOES NOT SUPPORT APPELLANT

Appellant claims the legislative history of NRS 201.230 demonstrates that the changes made in 2015 were to exclude children from being prosecuted as adults for this offense. This claim is belied by the record and without merit.

First, this Court should not reach the legislative history because the plain language of the statute is conclusive. This Court has repeatedly held that "if the language of a statute is clear on its face, we will ascribe to the statute its plain meaning and not look beyond its language." Koller v. State, 122 Nev. 223, 226, 130 P.3d 653, 655 (2006) (footnote and internal quotation marks omitted); accord, Potter v. Potter, 121 Nev. 613, 616, 119 P.3d 1246, 1248 (2005) ("When the language of a

statute is clear and unambiguous, its apparent intent must be given effect"); State Dept. of Human Resources, Welfare Div. v. Estate of Ulmer, 120 Nev. 108, 113, 87 P.3d 1045, 1049 (2004) (It is well established that when the language of a statute is plain and unambiguous a court should give that language its ordinary meaning and not go beyond it). As discussed above, the plain language of the statute is clear, and in no way excludes allegations under NRS 201.230 from being certified. Therefore, this Court should not reach the legislative history.

Regardless, a review of the record belies Appellant's claim. In Appellant's Opening Brief, Appellant cites a hearing held on February 13, 2015, by the Assembly Judiciary Committee to discuss the law. Appellant claims the bill was hotly debated and references that the bill was not passed unanimously. AOB at 27-30. However, a reading of the minutes from February 13, 2015, demonstrates that the committee did not debate whether any juvenile's lewd conduct allegations could be certified. The Committee's concern was that a juvenile would be charged with lewd conduct and possibly certified for "doing what high school students do." Assemblyperson Elliot T. Anderson; Minutes from the Committee on the Judiciary, February 13, 2015, at 15-19[1]. Assemblyperson Anderson stated,

[1] Respondent requests court to take judicial notice of these publicly available documents. NRS 147.130(2); Mack v. Estate of Mack, 125 Nev. 80, 91, 206 P.3d 98, 106 (2006). https://www.leg.state.nv.us/Session/78th2015/Minutes/Assembly/JUD/Final/99.pdf

> I talked with Mr. John Jones regarding a potential amendment changing section 8 to say, if the perpetrator is 21 years old or older to parcel it out more as bad conduct versus kids being kids. A 16-year-old can be certified, as you said, to proceed in adult court and that concerns me. I do not think high school students should be category A felons for doing what high school students do. I want to be very clear that I am not saying they should be doing some of these things, but we were all kids once and we know what happens in high school.

Id.

Furthermore, no one objected when Chief Deputy District Attorney James Sweetin of the Clark County District Attorney's Office said,

> If the juvenile court resolves and adjudicates it in juvenile court, he is not going to be a category A felon. However, if there are other reasons, maybe there is a history of this type of conduct, or other circumstances which would require the juvenile court judge to determine that society needs to be protected, and he needs to be punished, then it would go to adult court.

Id. at 15.

Appellant is correct in stating AB 49 was hotly debated, but the topic that was hotly debated is irrelevant to Appellant's crimes. AOB at 27. Appellant was not in a relationship with any of the victims, nor was he close in age with any of them. Appellant started rubbing his penis on the eldest victim's thighs when she was 7 years old. 1 ROA at 224. At that time, he was between the ages of 12 to 13. They were never in a relationship, and the victim never consented to the conduct. The youngest victim is only 5 years old, and Appellant is currently 19 years old. There

was a significant age gap between Appellant and all 3 of his victims, and none of the victims consented to the lewd conduct. 1 ROA at 224-225.

The Legislature did not object to adult certification because Appellant's conduct is the exact type that warrants certification. The Committee's concerns are not relevant to Appellant's case because Appellant committed lewd acts upon 3 separate victims, who were very young in age, against their will, for a period of 7 years. Appellant was not "doing what high school students do." Assemblyperson Elliot T. Anderson; Minutes from the Committee on the Judiciary, February 13, 2015, at 15. Further, Mr. Sweetin brought up the fact that juveniles charged with lewd conduct could be certified for other reasons or circumstances two separate times, and the Committee did not object. Id. at 14, 15. If the Committee did not want juveniles certified under any circumstances, as Appellant suggests, they would have expressed or at the very least mentioned that intention. But they did not. Therefore, Appellant's argument is belied by the record because the legislative history does not support Appellant.

IV. THE JUVENILE COURT'S RULING WAS CORRECT AND APPELLANT'S RELIANCE ON ROPER IS MISPLACED

Appellant claims he was improperly certified because he should be rehabilitated in the juvenile system rather than certified and transferred to the adult system. AOB at 23-39. However, Juvenile Court correctly certified Appellant pursuant to the Seven Minors factors in light of the serious facts of this case.

A. The Juvenile Court's Ruling was Correct

First, Appellant has not challenged the weighing process under Seven Minors, 99 Nev. 427, 434-35, 664 P.2d 947, 952 (1983). A juvenile court's decision to certify is reviewed for abuse of discretion. In re Eric A.L., 123 Nev. 26, 33, 153 P.3d 32, 36–37 (2007). Here, Juvenile Court found in its broad discretion that these arguments Appellant raises here were not sufficient to retain jurisdiction. Since Appellant has not challenged that weighing process, this Court should decline to second guess Juvenile Court's weighing of the Seven Minors factors. Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997); Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 58 (1992), cert. denied, 507 U.S. 1009, 113 S. Ct. 1656 (1993); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991).

However, considering the serious facts of this case, Juvenile Court reached the correct conclusion regardless. This Court has accorded the juvenile courts broad discretion in determining whether to waive jurisdiction over a juvenile. Eric A.L., 123 Nev. at 33, 153 P.3d at 36-37 (quotation marks and footnotes omitted). As such, this Court will uphold a juvenile court's decision to waive jurisdiction absent an abuse of discretion. Id. An abuse of discretion occurs if the "court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Id.

When deciding whether to waive jurisdiction of a minor, the juvenile court must base transfer decisions on the youth's criminal conduct, not the best interests

of the juvenile. Jeremiah B. v. State, 107 Nev. 924, 926, 823 P.2d 883, 884 (1991), overruled on other grounds, William S., 122 Nev. at 442, FN 23, 132 P.3d at 1021, FN 23. This has been the rule of law for transferring juvenile cases to the criminal system for over half a century. Prior to the mid-1900s, the juvenile court's purpose was to focus on the best interest of the child based on the view that juvenile offenders were simply victims of their environment, therefore neither morally nor criminally responsible for their behavior. Id.

The Nevada Legislature significantly altered that focus in 1949 when it mandated that "the Court's duty to the public is paramount" and significantly altered the purpose of the juvenile courts. Seven Minors, 99 Nev. at 431-32, 664 P.2d at 950. "The public interest and safety require that some youths be held accountable as adults for their criminal misconduct and be subjected to controls, punishment, deterrence and retribution found only in the adult criminal justice system." Id. This is based on the "idea that there is no arbitrary age at which all youths should be held fully responsible as adults for their criminal acts and that there should be a transition period during which an offender may or may not be held criminally liable, depending upon the nature of the offender and the offense." Id.; accord, Jeremiah B., 107 Nev. at 926, 823 P.2d at 884.

In compliance with public policy, this Court in Seven Minors, 99 Nev. at 431-32, 664 P.2d at 950, "changed the traditional juvenile court approach and placed

emphasis…on the necessity for holding older youths accountable for the more serious, culpable, and dangerous kinds of criminality." Id.; Jeremiah B., 107 Nev. at 926, 823 P.2d at 884. Now, "[t]he primary purpose of juvenile court intervention in delinquency cases is social control," and when the interest of the public conflicts with the best interest of the child, public interest takes precedence. Seven Minors, 99 Nev. at 433, 664 P.2d at 951.

In the context of a transfer proceeding, public policy mandates a complete abandonment of the "best interest of the child standard" and requires juvenile courts to consider first whether placing a juvenile in the adult criminal court jurisdiction would be in the best interest of the public. Id. "Once transfer is justified on the basis of public interest and safety, there is no need to consider the 'best interest of the child' or the youth's amenability to treatment in the juvenile court system except insofar as such considerations bear on the public interest.'" Id. at 433-34, 664 P.2d at 951-52.

In determining whether a juvenile should be certified as an adult, this Court in Seven Minors established a decisional matrix. Id. This "matrix is specifically designed to shift the focus of the transfer inquiry to the conduct of the juvenile in terms of the danger that behavior represents to society and away from an amorphous attempt at guesstimating whether a particular juvenile will be saved by Juvenile Court intervention." Id. Juvenile courts must consider the following 3 factors: (1)

the "nature and seriousness of the charged offenses;" (2) the juvenile's prior adjudications; and (3) subjective factors, "namely, such personal factors as age, maturity, character, personality, and family relationships and controls." Id. at 434-35, 664 P.2d at 952.

The "primary and most weighty consideration will be given to the first two of the categories," and the subjective factors act as a tiebreaker. Id. at 435, 664 P.2d at 952. In cases when subjective factors do act as a tiebreaker, factors like "mental attitude, maturity level, emotional stability, family support and positive psychological and social evaluations require a finding that the public interest and safety are best served by retaining the youth in the juvenile system." Id.

It is important to note that the community safety concerns that animated Seven Minors and Jeremiah B. were not in the nature of a philosophical debate about whether the long-term interests of the community and the youth before the court were better served by treatment and rehabilitation through continued juvenile court jurisdiction or punishment in the criminal court jurisdiction. This Court made it clear that the transfer matrix was specifically motivated by a real-world desire to allow the community to pursue the possibility of the kind of serious sanctions available only through criminal court jurisdiction. Id.

Here, Juvenile Court properly considered all 3 factors in the Seven Minors matrix when it found that public safety interests outweighed the best interests of

Appellant because the crimes he is accused of committing are heinous and egregious, and there was no evidence that the subjective factors warranted this case remaining in the juvenile system. Appellant repeatedly rubbed his penis on the eldest sister's thighs while she slept for a period of 7 years. 1 ROA at 224. Appellant started this vile act when she was only 7 years old. Id.

The second victim, Appellant's 13 year old half sister, stated the first time Appellant touched her was when she was 10 years old. Id. Appellant was approximately 16 years old at the time. Id. She reported he would try to pull down her underwear and would often hit her because he was angry. Id. These acts happened repeatedly for 3 years. Id.

The third victim was only 5 years old at the time of reporting. Id. At that time, Appellant was 17 years old. She reported Appellant did something to her vagina but did not want to tell the interviewer what he did because Appellant told her to keep it a secret. Id.

Appellant's actions were vile, deviant and sexual acts that occurred repeatedly for a period of 7 years. Appellant started sexually abusing the victims when they were very young, with Appellant being 12 years older than the youngest victim. Juvenile Court correctly certified the allegations against Appellant.

During the Certification Hearing, the Court found:

> So turning to the factors under Seven Minors, the first one, nature and seriousness of the charges, on that factor alone

– a presumption can be warranted under Nevada law, particularly when the acts are heinous and egregious; and these appear, given the age of the victims, the repetitive nature and everything going into the – allegations, they're certainly heinous and egregious; and it could potentially be cert – certified just on that alone.

I do like to at least take a look at everything that is available to me under Seven Minors because we are dealing with juvenile crimes, juvenile delinquent acts; and there is a – there is a purpose for the juvenile system; and we need to determine whether or not this is appropriately handled in the juvenile system.

So looking at prior adjudications, we don't have any education – sorry, any evidence of that. And typically that would bring up subjective facts. Here the subject – the subjective factors being argued, his personal history and how that has probably affected his psychological state and everything involved with that is – is certainly a factor that the Court's – Court considers.

The - the issue really is, given the heinous and egregious nature of these – these issues, this does not appear to be the type of case where sufficient treatment could be conducted in the time we still have.

We do from time – you know, I – I'm not one that just, you know, has a dead cutoff after 18 because there's a three-year statute because I – I – I have plenty of these cases that do terminate and for good reasons were a full three years is not ultimately needed. This is not that case. This is a case where full treatment and given the – the factors going – you know, the psychological factors, there would be a whole lot of work to be done that I just don't see getting done in the time frame that the juvenile court has available to it to work with a youth.

And in addition, with some of these charges having been alleged to have happened on the same victims while he

> was over 18, it makes far more sense and I think it is a – a valid subjective factor to consider that they all be tried in the same place at the same time so that whatever the system can do to help Byron with his own rehabilitation but also to, you know, obtain the required justice that – that our system asks for in these kinds of cases, that this case is the type that should on the Court's discretion here be certified.

1 ROA at 94-96. In light of the serious sexual nature of the offenses and the repeated damage he caused to 3 separate victims, Juvenile Court was correct in certifying the allegations against Appellant in light of the subjective factors of Seven Minors.

B. Appellant's Reliance on Roper is Misplaced

Appellant relies on Roper v. Simmons, 543 U.S. 551, 124 S.Ct. 1183 (2005), to claim he should not have been certified because he was a juvenile when he committed these crimes. However, Appellant's reliance on Roper is misplaced because he stretches it's scope beyond all reason.

Appellant's reliance on Roper is devoid of meaningful analysis warranting the application of this case to juvenile transfer proceedings. Roper did not address a juvenile court certifying a minor as an adult. Instead, it dealt with whether a juvenile can be sentenced to death or life without parole. That is not what is happening here. Appellant faces trial in the criminal system. He has not been tried, convicted, or sentenced for any crime. Juvenile Court has only decided that the questions of guilt and punishment should be decided in the criminal system.

Additionally, the case itself rejects Appellant's position that Juvenile Court erred in certifying Appellant as an adult. If Roper were intended to prevent the trial of juveniles in the adult criminal system based upon alleged immaturity, the Supreme Court would have held as much. While the United States Supreme Court extended significant protections to juveniles in Roper, it never once questioned the appropriateness of criminal court jurisdiction. Yet that is exactly what Appellant is asking this Court to do. As Appellant fails to provide applicable or relevant authority supporting his claim that this Court should abandon half a century's worth of jurisprudence, this Court should summarily reject Appellant's argument.

V. APPELLANT'S LENITY CLAIM WAS WAIVED AND FAILS ON THE MERITS

Appellant argues this Court must consider each possible interpretation of NRS 201.230 in light of the rule of lenity. However, Appellant waived this claim by failing to raise it below and cannot demonstrate plain error. Further, his contention fails on the merits.

Appellant did not raise a claim under the rule of lenity below and that failure waives all but plain error. Martinorellan v. State, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015); Maestas v. State, 128 Nev. 124, 146, 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 49, 343 P.3d at 594.

Appellant does not claim nor demonstrate plain error. Appellant only makes the bare and naked claim that the "[s]tatutory interpretation, legislative history, public policy, and the fundamental values of the justice system say that interpreting the law the way the District Court judge did was incorrect." AOB at 40; Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). However, as demonstrated above, the plain language of the statute is not ambiguous. Thus, there was no error, let alone an error that is readily apparent and prejudicial to Appellant's rights. Therefore, the rule of lenity does not apply, and Appellant cannot meet the plain error standard.

Appellant's claim also fails on the merits. The rule of lenity states ambiguity in a statute should be resolved in the defendant's favor. State v. Javier C., 128 Nev. 536, 541, 289 P.3d 1194, 1197 (2012). However, the rule only applies to statutes that are ambiguous. Id. Here, NRS 201.230 is not ambiguous. The statute does not prohibit certification in any way, nor does the statute dictate a separate punishment

for juveniles. Therefore, the statute is not ambiguous, and the rule of lenity does not apply.

VI. JUVENILE COURT DID NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE

Appellant claims Juvenile Court abused its discretion and violated the separation of powers doctrine when it certified him, subjecting him to punishment not found in the statute. However, this claim is meritless.

Initially, Appellant's argument regarding Juvenile Court's reasoning is fundamentally misleading. First, Appellant states, "the district court found it 'absurd' that the words written in the books of law would limit its power under NRS 62B.390 to certify a minor for adult prosecution." AOB at 41. There are no words in NRS 201.230 that state the court cannot certify a minor for adult prosecution, nor is there any separate penalty for juveniles enumerated in the statute. Second, what Juvenile Court found "absurd" was Appellant's argument that the statute is intended to prohibit the Court from certifying any allegations of lewdness with a child under the age of 14, under any circumstances. The Court found it absurd that, as argued below, a 17 year old could repeatedly molest a young child and be prohibited from being certified but could penetrate that same child and be certified. 1 ROA at 211. Therefore, Appellant's statement is fundamentally misleading.

Appellant further claims that Juvenile Court's reasoning asserted that "the legislature gave him powers under NRS 62B.390 that they could not curtail." AOB

at 41. However, again, this statement is fundamentally misleading. Juvenile Court reasoned it was able to certify the allegations against Appellant under the law, and the Court's interpretation of the law was that it was not the Legislature's intent to limit the Court's ability to certify allegations of lewd conduct with children under the age of 14. 2 ROA at 267-268. Juvenile Court reasoned the Legislature did not intend to curtail its ability to certify juvenile offenders, not that the Legislature did not have the power to curtail them. Id. Therefore, again, Appellant's argument is fundamentally misleading and belied by the record.

Regardless, Appellant's argument still fails on the merits. Pursuant to the Nevada Constitution, the legislative, executive, and judicial departments are separate and coequal branches of the state government. Mendoza-Lobos v. State, 125 Nev. 634, 639, 218 P.3d 501, 504 (2009); Blackjack Bonding v. Las Vegas Mun.Ct., 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000). During sentencing, it is the function of the Legislature to set criminal penalties and it is the function of the judiciary to decide what penalty, within the range set by the Legislature, if any, to impose on an individual defendant. Id. at 504-505; Villanueva v. State, 117 Nev. 664, 668, 27 P.3d 443, 445-46 (2001); Johnson v. State, 118 Nev. 787, 804, 59 P.3d 450, 461 (2002); Sandy v. Fifth Judicial District Court, 113 Nev. 435, 440, 935 P2d 1148, 1151 (1997). Once the Legislature has made policy and value choices by enacting statutory law, that law's construction and application is the job of the judiciary. N.

Lake Tahoe Fire v. Washoe Cnt. Comm'rs, 129 Nev. 682, 687, 310 P.3d 583, 588 (2013).

Here, Appellant's argument fails on the merits because it was well-within Juvenile Court's discretion to interpret the language of NRS 201.230 and to subsequently apply it to Appellant. Juvenile Court certified the allegations against Appellant, which was within the Court's discretion under the plain meaning of NRS 201.230 and NRS 62B.390. Therefore, Appellant's claim fails on the merits and Juvenile Court did not violate the separation of powers doctrine.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the order certifying Appellant.

Dated this 4th day of May, 2022.

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 and type-volume limitations of NRAP 32(a)(7) 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 7,410 words and does not exceed 30 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 4th day of May, 2022.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on May 4, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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