

1 SUPREME COURT OF THE STATE OF NEVADA

2
3 KEVIN JOHN MENTABERRY)

DOCKET NO. 83878

4 Appellant,)

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Elizabeth A. Brown
Clerk of Supreme Court

5 vs.)

6
7 STATE OF NEVADA,)

8 Respondent.)

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10 APPELLANT'S REPLY BRIEF
11 Fourth Judicial District Court
12 The Honorable Alvin Kacin

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Appellant Kevin Mentaberry is an individual person with no affiliations to any corporations or publicly held company.

Attorney John Malone is the principal of the law office of John Malone and appears on behalf of appellant.

- I. ANY WAIVER OF OBJECTION BY APPELLANT'S COUNSEL SHOULD NOT BE HELD AGAINST APPELLANT.
- II. THE JURORS WHO WERE FAMILIAR WITH A STATE WITNESS SHOULD HAVE BEEN EXCUSED FOR CAUSE
- III. THE JURY'S VERDICT IS NOT SUPPORTED BY SUFFICIENT EVIDENCE OF SPECIFIC INTENT

I. ANY WAIVER OF OBJECTION BY APPELLANT'S COUNSEL SHOULD NOT BE HELD AGAINST APPELLANT.

The State's answering brief focuses on this court's alleged discretion regarding whether or not to review an allegation of plain error. Appellant argued in

1 his opening brief that when the victim's counselor was allowed to testify at length
2 as to exactly what the victim had told her, as a prior consistent statement, the court
3 committed what this court has repeatedly held to be plain error by admitting
4 inadmissible hearsay. *See Patterson v. State*, 111 Nev. 1525, 1532, 907 P.2d 984,
5 989 (1995). Appellant conceded that his counsel failed to object and that therefore
6 this court should review for plain error. Appellant then went on to demonstrate that
7 this court's applicable precedents mandate that such error is reversible regardless of
8 counsel's failure to object at trial.

12 This court has repeatedly held that where, as here, the State's case against a
13 defendant accused of a sexual offense rests completely on the victim's testimony,
14 and out-of-court statements made to a counselor after the victim has developed a
15 motive to fabricate are admitted to corroborate the victim's in-court testimony, the
16 error is plain error and is reversible. *Gibbons v. State*, 97 Nev. 299, 302, 629 P.2d
17 1196, 1197 (1981). In its answering brief the State asks this court to disregard these
18 holdings and to disregard the plain error in appellant's case as a matter of the court's
19 discretion.

1 In *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018), this court
2 discussed that Nevada law provides a mechanism for an appellant to seek review of
3 an error he otherwise forfeited. That mechanism is easily satisfied in this case.
4 “Before this court will correct a forfeited error, an appellant must demonstrate that:
5 (1) there was an ‘error’; (2) the error is ‘plain,’ meaning that it is clear under current
6 law from a casual inspection of the record; and (3) the error affected the defendant’s
7 substantial rights.” (citing *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003);
8 NRS 178.602 (explaining when an unpreserved error “may be noticed”). In addition,
9 “plain error affects a defendant’s substantial rights when it causes actual prejudice
10 or a miscarriage of justice (defined as a “grossly unfair” outcome).” *Jeremias* at 50-
11 51, 412 P.3d at 49 (citing *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477
12 (2008)). In contrast to the court’s observation in *Jeremias* that the error did not cause
13 specific harm to the defendant, in this case it, not only is it clear that the admission
14 of significant amounts of otherwise inadmissible hearsay influenced the jury, caused
15 prejudice that it supposed to be prevented by the evidentiary rules, and led to
16 appellant’s conviction; the error has been found by this court to be reversible as
17 matter of law. See *Patterson v. State*, 111 Nev. 1525, 1532, 907 P.2d 984, 989
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(1995); . *Daly v. State*, 99 Nev. 564, 568–69, 665 P.2d 798, 802 (1983), *modified on other grounds by Richmond v. State*, 118 Nev. 924, 59 P.3d 1249 (2002); *Gibbons v. State*, 97 Nev. 299, 629 P.2d 1196 (1981).

Here there can be no argument that the admission of Leslie Rangel’s extensive hearsay statements about what the victim, A.P., told her two weeks after the incident affected appellant’s substantial rights and caused actual prejudice. Trial counsel’s decisions about whether or not to object in this situation should not be held against appellant. This court has held that the factual scenario at play in this situation constitutes plain and reversible error. Appellant should not be punished and deprived of his liberty based on his counsel’s miscalculations about objecting.

II. THE JURORS WHO WERE FAMILIAR WITH A STATE WITNESS SHOULD HAVE BEEN EXCUSED FOR CAUSE

A similar analysis applies to the error of two jurors who knew the victim’s mother remaining on the jury. Again, the State asks this court to disregard the plain error and to ignore its own precedent. Appellant explained how, in a small community, the jurors’ familiarity with the State’s witness would pressure each of them to find in favor of her child, rather than appellant. Such pressures would prevent or substantially impair the juror’s ability to be impartial and apply the law.

1 This court has agreed that such pressures can be ground for excusing a juror for
2 cause. *See, e.g., Khoury v. Seastrand*, 132 Nev. 520, 377 P.3d 81, 88-89 (2016)
3 (jurors whose voir dire answers show bias must be dismissed for cause); *Preciado v.*
4 *State*, 130 Nev. 40, 44, 318 P.3d 176, 178-79 (concluding the district court should
5 have removed for cause a prospective juror whose answers cast doubt on her ability
6 to be impartial); *Jitnan v. Oliver*, 127 Nev. 424, 431-32, 254 P.3d 623, 628-29 (2011)
7 (holding that prospective jurors whose views would prevent them from performing
8 their duties as jurors should be removed for cause). This court should not accept the
9 State's invitation to disregard the plain error and should recognize the pressures on
10 the jurors to be a "bias may also arise based on the juror's background or experiences
11 and may exist even where the juror promises impartiality." *See Sanders v. Sears-*
12 *Page*, 131 Nev. 500, 508-09, 354 P.3d 201, 206-07 (Ct. App. 2015); *see also United*
13 *States v. Torres*, 128 F.3d 38, 45-48 (2d Cir. 1997) (addressing implied and inferable
14 bias). Despite both jurors' assurances that they would be fair and impartial, it is
15 nevertheless clear that both faced social and pressures and biases that should have
16 led the court to excuse them for cause.

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1 Mentaberry requests this court reverse the judgment of conviction.

2 DATED this 1 day of August, 2022.

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4 By: _____

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**CERTIFICATE OF COMPLIANCE
(NRAP 32)**

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 Word's Times New Roman in 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it 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.

1 I affirm that this brief does not contain the social security number of any
2 person.

3 Dated this 1 day of August, 2022.

4 By: _____

5 John E. Malone

6 Attorney for Appellant
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CERTIFICATE OF SERVICE

I affirm that on August 1, 2022, I served the foregoing Appellant's Reply Brief on the following parties:

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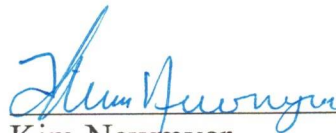
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Dated this: 1ST day of August, 2022

By:


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