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2 IN THE SUPREME COURT OF THE STATE OF NEVADA

3 Electronically Filed
4 Jul 01 2022 02:20 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

5 KEVIN JOHN MENTABERRY,

6 Appellant,

7 CASE NO.83878

8 vs.

9 THE STATE OF NEVADA,

10 Respondent.

11 Appeal From the Fourth Judicial District Court
12 Of The State of Nevada
In And for The County of Elko

13 **RESPONDENT'S ANSWERING BRIEF**

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1 know even at the time of her testimony, now 2 years after the incident, that
2 A.P. had taken any alcohol from their house. AA Vol. 1 p. 239.

3 A.P. testified that she had only 1 shot of alcohol and some marijuana, a
4 couple of hits on the bowl shared between all the party attendees. Id. at 128-
5 129. A.P. said that she felt some effects from the marijuana that lasted about
6 an hour, but the single drink did not affect her. Id. She also stated that any
7 effects of the alcohol or marijuana had worn off by the time the criminal
8 incident occurred, which was after the New Year's hour. Id. at 133.

9 A.P. described for the jury that she and her friends celebrated the New
10 Year, but not in a significant celebratory fashion, and afterward they played
11 video games and finally watched television. Id. at 130. A.P. was on the couch
12 with A.H. in the basement watching tv when Mentaberry came downstairs.
13 Id. Mentaberry was drunk, he sat at first on the floor and Mentaberry's dog
14 was next to A.P., then Mentaberry moved the dog and sat next to A.P. Id. at
15 130-131. While next to A.P., Mentaberry started rubbing her stomach under
16 her clothes, then put his hand further under her shirt rubbing her breasts, and
17 then put his hand down her pants touching the outside of her vagina. Id.
18 While touching A.P. Mentaberry made statements, asking A.P. her age and
19 she told him, 14, to which he replied, "Oh, that's scary," but he continued to
20

1 touch her. AA Vol. 1 p. 130-131. Mentaberry asked to be able to use his mouth
2 on her and A.P. told him "No" and moved his hand, but Mentaberry persisted.
3 Id. at 132. At some point, A.H. who was also on the couch woke up and saw
4 the two of them close together and told Mentaberry it was time to go upstairs.
5 Id. After some coaxing they were able to get him to leave and then they went
6 into a bedroom of the friend, Mentaberry's daughter, and locked the door. Id.
7 After going into the room, Mentaberry returned and banged on the door, but
8 the girls would not let him enter. Id. at 132-133. The next morning,
9 Mentaberry gave A.P. a ride home at which time he apologized by saying,
10 "sorry for being a drunken idiot." Id. at 133, 164, 269-270, 311.

11 The State also called the other girl who was present on the couch during
12 the crime, A.H. Id. at 180, 185. She was present on December 31, 2017, and
13 had arrived at 5:30 or 6:00, she is currently a friend of Mentaberry's daughter,
14 A.M., but no longer friends with A.P. who she described as more of a friend
15 of another girl, A.T., than either herself or A.M. She also stated that she and
16 A.M. were very close friends and still are. Id. at 180-181, 183. She described
17 a number of teenagers present along with Mentaberry and another adult friend
18 of his being there. Id. The teenagers started drinking vodka at around 6 p.m.,
19 but A.P. had not arrived at that point. AA Vol. 1 p. 180-181, 183. They also
20 started smoking marijuana at that point, but she claimed she only took one hit

1 out of the bong. Id. at 182. A.H. described the older daughter of Mentaberry,
2 Mazy, as the one who provided the vodka and the marijuana, and that she had
3 graduated the year before. Id. at 181-182. A.H. also testified that this was the
4 most drunk she, A.H., had ever become. Id. A.H. believed that A.P. showed
5 up at around 8 p.m. and that she had brought a bottle of rum. Id. A.H. had seen
6 Mentaberry throughout the evening and knew that he was intoxicated as he
7 was “falling over air” which she described as tripping over nothing, and she
8 could just tell having seen him intoxicated on other occasions that he was the
9 most intoxicated she had ever seen Mentaberry. Id. at 183. She described the
10 Mentaberry home as a hang out spot for her and Mentaberry’s daughter, but
11 that A.P. had never been there before that night. Id. A.H. described taking a
12 nap around 10:00 p.m. and then being awakened to celebrate the actual New
13 Year, and after the New Year’s celebration, which was not much, A.M. went
14 to sleep in her room and A.H. and A.P. stayed on the couch as A.P. wanted to
15 finish watching her show. AA Vol. 1 p. 185. A.H. did remember Mentaberry
16 coming downstairs and that he fell down the stairs very hard behind the couch
17 area. Id. Mentaberry got up from the floor at some point and grabbed the rum
18 bottle on the table and might have taken a drink. Id. at 186. Mentaberry then
19 came and sat on the couch between A.H. and A.P. and watched tv with them.
20 Id. A.H. fell asleep and when she woke up she described at trial that

1 Mentaberry was asleep and that A.P. was staring at her phone, but then
2 admitted that when she initially talked to the officer and detective about this
3 case she had told them that Mentaberry was really close to A.P., Mentaberry
4 was leaning on A.P.'s shoulder and that A.P. looked uncomfortable and had
5 not made any mention whatsoever of the cell phone she had claimed at trial,
6 and that A.P. was sitting weird, shoulder to shoulder with Mentaberry. Id. at
7 187, 190. A.H. then convinced Mentaberry to go upstairs but stated he
8 struggled getting up because he was intoxicated. Id. at 187-188. After
9 removing Mentaberry, A.H. came back downstairs and asked A.P. if she was
10 okay and A.P. told her that Mentaberry had touched her stomach and A.H.
11 noticed that A.P. had a teary eye or was crying. Id. She affirmed that A.P. told
12 her that Mentaberry had touched her stomach and then invited her to go and
13 sleep in A.M.'s room which they did. AA Vol. 1 p. 187-188. They then went
14 into A.M.'s room and A.M. admitted them and then locked the door. Id. The
15 next day, A.H. messaged A.P. to ask if she was 'okay.' Id. at 189.

16 The State called as a witness Leslie Rangel, a Nevada licensed clinical
17 social worker that had been treating A.P. for approximately 4 years in concert
18 with a psychiatrist, Dr. Khurana. Id. at 203. Rangel had had a session with
19 A.P. on January 12, 2018, which she described as a "crisis session." Id. at 204,
20 241. During this treatment session is when A.P. disclosed to her what had

1 happened at the party, that Mentaberry had touched her on her thighs and in
2 inappropriate places up her legs as well as on her breasts. Id. 204, 214. While
3 A.P. described the events to Rangel, Rangel described A.P. as being really
4 upset, not making eye contact, 'shook up,' and confused about what to do.
5 Id. at 205. A.P. told Rangel that she didn't want "it" to be a problem. Id. Ms.
6 Rangel reported to the police and wrote a statement. Id. at 206. As a result
7 of the disclosure Rangel provided further counseling services to A.P. needing
8 to "change gears" with her current counseling because A.P. was now
9 struggling with trauma. Id. Rangel was asked to describe the difference she
10 had seen in A.P. from before the crime and how A.P. was after the crime, and
11 Rangel emotionally described how A.P. before the crime was doing great and
12 that Rangel had recommended that A.P. didn't need therapy anymore, to
13 discharge her from therapy was her recommendation. AA Vol. 1 p. 206.
14 However, after the crime, A.P. struggled with "really bad trauma symptoms,
15 panic attacks, increased medication. She was bullied at school for reporting
16 this... she quit high school for a year, she fell behind in school...struggled for
17 the next two years waiting to finalize this process...I have seen a significant
18 mental health decline. And that's the changes I have seen." Id. at 206-207.
19 Later Rangel described "avoidance behaviors" that A.P. was dealing with due
20 to triggers that caused panic attacks, like seeing a vehicle like Mentaberry's.

1 Id. at 214. Prior to the crime A.P. had never been treated for panic attacks, it
2 was only after the crime that these panic attacks began. Id. Rangel wrote a
3 statement for the police about the visit when the disclosure occurred, which
4 was admitted into evidence at the request of defense counsel. Id. at 210-211;
5 RA Vol. 1 p. 167-169. Defense counsel then used the statement during cross
6 examination of Rangel. Id.

7 The State also called a forensic psychiatrist, Dr. Melissa Piasecki. Id.
8 at 215-216. She reviewed the police reports, recorded interviews, and
9 transcripts regarding this case, talked with A.P. as well as her mother and
10 prepared a report. AA Vol. 1 p. 216-217. Dr. Piasecki was asked to testify
11 about disclosure patterns of victims of sexual assault or trauma to include
12 delayed disclosures, partial disclosures and even inconsistencies and how they
13 are common, and also the types of concerns that victims may have which
14 cause such disclosures and inconsistencies, and she opined that the actions of
15 A.P. were consistent with being the victim of sexual assault. Id. at 217-220.
16 Dr. Piasecki also talked about the response to traumatic events - the fight,
17 flight or freeze responses as well as memory being affected by such events.
18 Id. at 219, 221. She also opined that the alcohol and/or marijuana and/or
19 prescription medications would not have been able to create a fantasy of what
20 happened that would have resulted in the trauma that Dr. Piasecki was seeing

1 manifest in her post-crime symptoms, and that likewise the loss of teenage
2 friends would not create the trauma that she is suffering now and that a sexual
3 assault does create the type of trauma that would be consistent with the
4 behaviors seen in A.P. and for which she is being treated at the time of the
5 report. Id. at 220-221.

6 A.P.'s mother, Shawna Eklund testified and confirmed that A.P. was
7 receiving counseling from Dr. Khurana and from witness Rangel and that she
8 had been prescribed medications. AA Vol. 1 p. 235. She also described the
9 changes in her daughter since the date of the crime as follows: being more
10 withdrawn, not wanting to go to school, staying in her room all the time and
11 wouldn't come out, and these behaviors caused Ms. Eklund to call the
12 counselor Rangel. Id. Ms. Eklund also described how A.P. started suffering
13 panic attacks which she had never seen her daughter suffer from before, which
14 Ms. Eklund described as shortness of breath or couldn't breathe and crying,
15 and as a result it required the readjusting of A.P.'s medications. Id. at 236.
16 Ms. Eklund confirmed that she was the one who set up the emergency or
17 "crisis" appointment due to her daughter's behavior in the days following the
18 crime. Id. at 241.

1 The initial responding officer Kyle Craig also testified as the person
2 who took the report from Rangel and met with A.P. at that time. AA Vol. 2
3 p. 264. He described A.P.'s demeanor as having very closed-off body
4 language, her head was down, and she was crying. Id. at 264, 270. He also
5 testified about the inconsistencies in A.H.'s jury trial testimony as opposed to
6 her statements to him soon after the crime noted above. Id. at 265-266.

7 Finally, the State called Det. Marshowsky who had conducted a
8 forensic interview with A.P. AA Vol. 2 p. 272. He described her demeanor
9 change in A.P. once they started talking about the crime and how it was a
10 marked change from the previous phases of the forensic interview. Id. at 274-
11 276. On cross examination he was also asked thoroughly about the protocols
12 of the forensic interview and the concerns that may have existed in this case
13 because the other officer had already interviewed A.P. and the concerns about
14 coaching a witness and lying. Id. at 280. Detective Marshowsky was also
15 asked extensively on cross examination about statements made during the
16 interview by A.P. Id. at 281-283. Following this examination, the State
17 offered the entire video to allow the jury the opportunity to review her
18 demeanor and statements during the interview in context and about which
19 Marshowsky was asked out of context and about only certain statements. Id.
20

1 at 283. The court permitted the admission of the recorded interview of A.P.
2 with Detective Marshowsky. Id.

3 The defense case consisted of Mentaberry's 2 daughters, A.M. and
4 Mazy, as well as his own testimony. Id. at 286, 296, 301. All of them testified
5 that everyone was there that night, that everyone was getting along, that the
6 defendant and his friend were intoxicated, that the teenagers had had some
7 alcohol and marijuana and were also intoxicated or perhaps buzzed. AA Vol.
8 2 p. 287, 289, 290, 292, 294, 298, 299, 300, 303. Mentaberry's friend, Nate,
9 was "on one" already, but not quite three sheets to the wind when Mentaberry
10 picked him up to bring him over to the house. Id. at 303. Mentaberry and
11 Nate shared a 12 pack of Bud Light at the house. Id. Mentaberry went
12 downstairs with Nate to see what was going on with the kids at around 7:30
13 after having already consumed 8 or 9 beers at that point. Id. at 304, 308.
14 Mentaberry found the smell of weed and saw the rum bottle and the vodka.
15 Mentaberry then took one bottle and Nate took the other and they took them
16 upstairs. Id. Nate then felt the situation was not a good situation and he called
17 a cab and left between 8:30 and 9:00. Id. Mentaberry went to bed for a time,
18 then heard a noise and tried to go downstairs, where he fell due to his
19 intoxication which he described as not black out drunk but pretty drunk, not
20 trashed though. Id. at 305. Mentaberry confirmed that he had never met A.P.

1 before this night. Id. Mentaberry confirmed that he sat on the couch next to
2 the dog and A.H. with the dog between he and A.P. Id. at 306. Mentaberry
3 then claims he fell asleep and the next thing he remembers is A.H. telling him
4 to go upstairs. Id. He then went to bed, got up the next morning, took everyone
5 home and he did agree that he said he apologized for acting like a drunken
6 fool. AA Vol. 2 p. 307. Mentaberry denied ever touching A.P. Id.

7 On cross examination, Mentaberry agreed that hanging out with his
8 daughter's friends when his daughter wasn't around wasn't normal, and that
9 "I don't have a good answer for that, sir." Id. at 310. Mentaberry then stated
10 his intentions were to get the alcohol out of the basement, but he didn't do
11 that, but rather stayed in the basement, being concerned for A.H. who he said
12 was really drunk, but he gave no thought to calling A.H.'s parents. Id. at 309-
13 310. Mentaberry's memory was of "highlights" during the evening and
14 described the party as devoid of any fights or altercations. Id. at 311-312.

15 With regards to the two jurors, the first, juror Tracy, served as juror
16 number one and the second juror, juror Garcia, was the first alternate. AA Vol.
17 1 p. 103-104. When juror Demick asked to be excused because of the nature
18 of the case before any testimony had been taken, juror Garcia was seated as
19 juror number eleven. Id. at 125.
20

1 Juror Tracy's voir dire prior to the start of trial revealed that he knew
2 of witness Eklund but didn't know her personally and had never met her. AA
3 Vol. 1 p. 124. Juror Tracy knew witness Eklund's husband's son which would
4 be witness Eklund's stepson. Id. While witness Eklund's stepson, a 12-year-
5 old, is "kind of" or "pretty much" his nephew he had never met witness
6 Eklund before. Id. at 124-125. Juror Tracy knew nothing about the case and
7 had never discussed the case with anyone and detailed his relationship to the
8 witness as a "friend of a friend." Id. He assured the court he could be fair and
9 impartial in the case. Id.

10 Juror Garcia's voir dire took place much later in the case coming about
11 when juror Garcia was first able to see witness Eklund at which point he
12 immediately asked for a minute of the court's time. Id. at 234. During this
13 time, he disclosed that upon seeing the witness he recognized her but stated
14 that he didn't know her personally. Id. He reiterated that he did not know her
15 personally but stated that he had seen her around due to living in Carlin where
16 community functions occur. Id. He assured the court that he could continue
17 to be fair and impartial. Id.

1 Neither of the attorneys for the State or the Defense asked that either
2 juror be removed for cause and in the case of juror Garcia neither attorney
3 asked a single question of juror Garcia. Id.

4 SUMMARY OF THE ARGUMENT

5 Plain error review for perceived errors that were not preserved for
6 appeal is discretionary and given the facts of this case this Court should
7 exercise its discretion and decline to review for plain error any issue now
8 raised on appeal dealing with the seating of the two jurors or the alleged
9 hearsay issues.

10 There was simply no reason to dismiss either of the jurors and neither
11 the court nor the attorneys requested it.

12
13 Statements made by A.P. to her therapist during the “crisis” treatment
14 session held just 11 days after the crime are admissible hearsay statements
15 under NRS 51.115 and NRS 51.035(2). Further, the statement written by
16 Rangel for the police documenting those statements from A.P. and offered by
17 defense counsel at trial is admissible as evidence of a prior inconsistent
18 statement. Finally, the recorded interview of A.P. conducted by Marshowsky
19 was admissible under NRS 47.120 as well as NRS 51.035(2).

1 A.P. testified that Mentaberry touched her breasts, stomach, and vagina
2 all under her clothing. When asked if there was a penetration of her vagina,
3 she stated that she could not remember but later in her testimony said that
4 there was. The jury's verdict as to Lewdness was therefore entirely supported
5 by the evidence and reasonable given the other two choices required proof of
6 sexual penetration about which A.P. was equivocal.

7 ARGUMENT

8 I. PLAIN ERROR REVIEW OF PERCEIVED ERRORS THAT WERE
9 NOT PRESERVED FOR APPEAL ARE DISCRETIONARY AND, IN THIS
10 CASE, SHOULD NOT BE REVIEWED.

11 Mentaberry cites Nelson v. State, 12 Nev. 534, 543 (2007) to define
12 plain error review. A little more recently the court gave the following
13 definition of plain error review:

14 "Plain error review is discretionary, not obligatory. Jeremias v. State,
15 134 Nev. 46, 52, 412 P.3d 43, 49, cert. denied, ___ U.S. ___, 139 S. Ct.
16 415, 202 L. Ed. 2d 320 (2018). To establish plain error, "an appellant
17 must demonstrate that: (1) there was an 'error'; (2) the error is 'plain,'
18 meaning that it is clear under current law from a casual inspection of
19 the record; and (3) the error affected the defendant's substantial
20 rights." Id. at 50, 412 P.3d at 48. A reviewing court determines

1 "whether an error is 'plain' . . . by reference to the law as of the time of
2 appeal" and "typically will not find such error where the operative legal
3 question is unsettled." United States v. Weintraub, 273 F.3d 139, 152
4 (2d Cir. 2001), cited approvingly in Gaxiola v. State, 121 Nev. 633,
5 648, 119 P.3d 1225, 1232 (2005). A plain error does not affect a
6 defendant's substantial rights unless "it causes actual prejudice or a
7 miscarriage of justice." Jeremias, 134 Nev. at 51, 412 P.3d at 49."
8 Flowers v. State, 456 P.3d 1037, 1045 (Nev. 2020). The first question for this
9 Court to consider is whether to consider the first two issues at all given the
10 facts of this case. A brief review of the transcript regarding the two jurors
11 indicates clearly that none of the parties at trial were the least bit concerned
12 about jurors Tracy and Garcia remaining on the jury. AA Vol. 1 p. 124-125,
13 234. Both jurors brought to the court's attention their knowledge of witness
14 Eklund out of an abundance of caution, both parties were allowed to voir dire
15 the jurors. Id. There is just simply no issue regarding the jurors, and it is clear
16 from the transcript.

17 The cases cited by Mentaberry, Khoury v. Seastrand, Preciado v. State,
18 Jitnan v. Oliver, Sanders v. Sears-Page, have a common thread that there was
19 a challenge for cause at the trial level, but here Mentaberry made no such
20 objection. Also, in those cases there often were equivocal answers as to

1 impartiality, which again did not happen in Mentaberry's case. In only one
2 of the cases where there was implied bias, it was because the juror had had
3 the exact same experience as the trial at hand was going to present and there
4 was also an equivocal answer by the juror. Sanders v. Sears-Page, 131 Nev.
5 500, 2015 Nev. App. LEXIS 8, 354 P.3d 201, 131 Nev. Adv. Rep. 50. Again,
6 that is not the case here.

7 With regards to the hearsay statements, these were also not preserved
8 by objection for appeal. The reality is that Mentaberry's strategy was to point
9 out inconsistencies in the victim's disclosures in an effort to color her as a liar
10 because of the details that were left out in some instances. Mentaberry's trial
11 counsel is the one who offered the Rangel statement detailing what A.P. told
12 her in an effort to point out such inconsistencies, having previously used the
13 A.P. statement to do the same so both were admitted. AA Vol. 1 p. 147, 210-
14 211; RA Vol. 1 p. 164-169. Likewise, trial counsel did not object to the video
15 interview coming in other than to say it was cumulative due to trial counsel
16 having already gone through the inconsistencies that they felt applied during
17 cross examination of the detective, again showing that they wanted these
18 "hearsay" inconsistent statements into evidence. AA Vol. 2 p. 283.

19 To raise these issues on appeal is to chop off the legs of trial counsel's
20 defense theory which was to point out such inconsistencies and hope the jury

1 found A.P. sufficiently unbelievable because of them and thereby acquit
2 Mentaberry. This is a trial strategy which would be considerably weakened
3 if such inconsistencies, even minute ones, were not proffered. There were no
4 objections to their admissibility because defense trial counsel deemed them
5 inconsistent and therefore wanted the evidence in the record. This Court
6 should decline to review the hearsay for plain error which in effect would be
7 a review of the trial strategy and this appeal is not the place for such an
8 effective assistance of counsel claim, nor has it been raised. Riga v. McNabb,
9 2021 Nev. App. Unpub. LEXIS 287, *5-6, 487 P.3d 30, 2021 WL 2138501
10 (Further, without Riga first having moved for a new trial, we decline plain-
11 error review of any attorney misconduct on appeal. In doing so, we emphasize
12 that plain-error review is discretionary).

13 A. THERE WAS NO ERROR REGARDING THE TWO JURORS.

14 Mentaberry never requested that a juror be excused for cause and
15 neither did the State. The Nevada Supreme Court has since both Nelson and
16 Flowers rendered the opinion in Dean v. Narvaiza, 502 P.3d 177, 181 (Nev.
17 2022), wherein they charged the district courts with intervening in the voir
18 dire process when counsel exceeds the appropriate bounds of voir dire while
19 noting that district courts must also not unreasonably restrict voir dire. Id.;
20 NRS 175.031. Unfortunately, this standard is not fully fleshed out as to how

1 it might apply and therefore this area of law is not well settled. While the
2 district courts must clearly walk a fine line at times, this is not one of those
3 close cases. The standard from Nelson and Flowers is that the error is so plain
4 that it is unmistakable upon a “casual inspection” of the record, suggesting
5 that the error has to jump off the page at the reader without overthinking it, or
6 in other words it has to be that obvious, but in this case the casual reader is
7 left with no such obvious feeling. Nelson at 543.

8 In this case, neither juror knew the witness. AA Vol. 1 p. 124-125, 234.
9 Neither juror was aware of the facts of the case. Id. Both jurors assured the
10 court they could be fair and impartial. Id. Mentaberry continually refers to
11 the associate of the juror Tracy as his “nephew,” but the record shows that the
12 child is not the actual nephew of the juror, but rather a child he treats like a
13 nephew, being the son of his friend, the child is 12 and they have never
14 discussed the case. AA Vol. 1 p. 124-125, 234. Nothing in this record jumps
15 off the page at the reader, it didn’t jump off the page at the judge, counsel for
16 the State or for Mentaberry.

17 The allegation is not so unmistakable during a casual inspection of the
18 record, but that’s not all, even if the error were plain Mentaberry would have
19 to demonstrate that this error prejudiced him and affected his substantial
20 rights. Nelson at 543. Nothing in the record supports this as both jurors said

1 unequivocally that they could be fair and impartial. On both fronts
2 Mentaberry's claim fails as to both jurors.

3 B. THE ADMITTED STATEMENTS WERE ADMISSIBLE DUE TO
4 VARIOUS HEARSAY EXCEPTIONS.

5 During the trial, trial counsel did not object, and the court did not sua
6 sponte intervene, when Rangel was asked about what A.P. had told her about
7 the night of the incident. Mentaberry assumes that the reason that the
8 testimony was offered was under the theory of a prior consistent statement,
9 but this is only conjecture on his part as none of this was argued in court.
10 Rangel was A.P.'s treating counselor working with Dr. Khurana a licensed
11 psychiatrist for the past 4 years at the time. AA Vol. 1 p. 203. The disclosure
12 occurred during a treatment session which she described as a "crisis" session
13 because of A.P.'s then behavior following the crime. Id. at 204, 241. The
14 statements were admissible because of NRS 51.115 as well as NRS 51.035(2).
15 The reality is multiple theories supported their admissibility.

16 NRS 51.115 reads: "Statements made for purposes of medical
17 diagnosis or treatment and describing medical history, or past or present
18 symptoms, pain or sensations, or the inception or general character of the
19 cause or external source thereof are not inadmissible under the hearsay rule
20 insofar as they were reasonably pertinent to diagnosis or treatment."

1 In Felix v. State, 109 Nev. 151, 195 (1993) the Nevada Supreme Court
2 stated that:

3 “statements made to a psychiatrist or psychologist can be made for the
4 purpose of medical treatment or diagnosis, albeit for a psychological
5 problem, and these statements may be sufficiently reliable to be
6 included within the ambit of NRS 51.115. We do not feel that the
7 exception should ordinarily be extended to statements made to
8 therapists or family counselors who are not licensed psychologists or
9 psychiatrists.” Id.

10 As applied to this case, Rangel had been treating A.P. in concert with
11 Dr. Khurana a licensed psychiatrist. AA Vol. 1 p. 203. Thus, this is not just a
12 statement to some lone therapist or lone family counselor, but one who was
13 working with a licensed psychiatrist and therefore while ‘ordinarily’ Rangel
14 may not qualify on her own, in this case she should qualify due to the joint
15 nature of the treatment with Dr. Khurana both before and after the crime.
16 Therefore, the State avers that A.P.’s statement to Rangel during this type of
17 counseling session should be admissible under NRS 51.115. Rangel was not
18 working for law enforcement and has continued to treat A.P. since this event
19 as stated by Rangel. The Felix court left open exceptions, using the word
20 “ordinarily” without explaining further, and where here Rangel works with a

1 psychiatrist in the treatment of A.P. it makes this case not a case for plain error
2 because “the operative legal question is unsettled” and since neither side
3 objected and the court did not intervene it is quite clear neither side saw this
4 as an obvious error due to the above statute and case law. Flowers at 1045.

5 Furthermore, the statement is admissible as a prior inconsistent statement
6 under NRS 51.035(2). Obviously A.P. had already testified and was subject
7 to extensive cross examination in this case about her various statements, some
8 that she remembered and some that she did not. AA Vol. 1 p. 151.

9 “When a trial witness fails, for whatever reason, to remember a
10 previous statement made by that witness, the failure of recollection
11 constitutes a denial of the prior statement that makes it a prior
12 inconsistent statement pursuant to NRS 51.035(2)(a). The previous
13 statement is not hearsay and may be admitted both substantively and
14 for impeachment.”

15 Crowley v. State, 120 Nev. 30, 35, 83 P.3d 282, 286 (2004).

16 In this case both the State and Mentaberry utilized such inconsistencies
17 or lack of memory, albeit differently. For Mentaberry, inconsistencies were
18 pointed out to show that A.P. was unbelievable, asking the jury to look at the
19 different things she said over time and to different people and then Mentaberry

1 suggested during opening and argued at closing that the jury should conclude
2 she is not credible. RA p. 213-215, 218-223.

3 For the State, Dr. Piasecki explained about the nature of sexual assault
4 victims, children in particular, and their disclosure patterns and how
5 inconsistencies or partial disclosures are not uncommon at all. AA Vol. 1 p.
6 217-220. What Mentaberry claimed made A.P. unbelievable the State averred
7 it is consistent with someone who has been sexually assaulted. Regardless of
8 the theory of relevance, either theory is correct in allowing the statements in
9 as prior inconsistent statements. Further, due to the inconsistencies and failure
10 of memory it is not plain that this is any sort of error. The statements to Rangel
11 were brief and the crux of her testimony focused upon the changes that she
12 had seen in the child since the crime had occurred vs. how she was prior to
13 the crime.

14 Lastly, Rangel's statements were admissible as a prior consistent
15 statement, under NRS 51.035. There was never any showing that A.P. had a
16 motive to lie. A.P. had never been to the house, she had never met the
17 defendant, there were no fights, altercations or arguments during the party,
18 there was never a motive to lie put forth. AA Vol. 1 p. 1-2, 127-128, 135, 156,
19 165; AA Vol. 2 p. 287, 289, 290, 292, 294, 298, 299, 300, 303. That A.P. may
20 have struggled with mental health prior to this crime is not a motive to lie, it's

1 just a fact in the case. A.P. gained absolutely nothing if this is an untruth. She
2 lost her friends; she didn't gain them. AA Vol. 1 p. 149. She quit going to
3 regular school and started online school, she didn't get special treatment and
4 passing grades for sympathy. Id. at 139, 206-207. She suffers panic attacks
5 now and deals with further mental health issues, basically having to start at
6 square one with her counseling again when discharge from further counseling
7 was the next step according to Rangel prior to the crime. Id. at 205-207, 236.
8 A.P. didn't even want to continue going through with the trial at one point
9 during cross examination she was having such a miserable time explaining
10 what Mentaberry did to her - yet again. Id. at 153. She has never been shown
11 to have a motive to lie about this. To say that she has a motive to lie because
12 once she has 'rung the bell' she cannot un-ring it and therefore to protect her
13 reputation she must perpetuate it is a self-fulfilling unfounded accusation by
14 the defense. If permitted, this theory renders this hearsay exception entirely
15 meaningless because in every single case they will be able to say this without
16 exception.

17 There was no plain error as to the statements made to Rangel.

18 Finally, the recorded forensic interview of A.P. Again, A.P. was asked
19 extensively about her varying accounts and disclosures, the inconsistencies
20 over the minutia, and when Marshowsky was asked about these alleged

1 inconsistencies of A.P.'s statements during the interview the State sought
2 admissibility of the recorded statement. AA Vol. 2 p. 281-283. NRS 47.120
3 allows:

4 “When any part of a writing or recorded statement is introduced by a
5 party, the party may be required at that time to introduce any other part of it
6 which is relevant to the part introduced, and any party may introduce any other
7 relevant parts.”

8 A.P.'s statements and inconsistencies had been the subject of the trial
9 by the defense. To fully determine whether she truly was inconsistent or
10 whether she was just disclosing in a common pattern as Dr. Piasecki
11 described, was something that the jury had to decide. To allow them to review
12 the interview that had been asked about to both Marshowsky and A.P. was an
13 effort to put those alleged inconsistencies in context. NRS 47.120 exists to
14 protect a party from cherry picking statements out of context. Indeed, there
15 were jury instructions, number 22 and 23, about the role of the jury in
16 evaluating testimony and inconsistencies. RA Vol. 1 p. 198-199.

17
18 The lone stated objection made by trial counsel with regards to the
19 recording that Mentaberry didn't raise on appeal, was that to watch the
20 recording was cumulative which was an admission that they had used the

1 statements from the recording, claiming they were inconsistencies, and
2 wanted to keep out others. AA Vol. 2 p. 283. The State was entitled to allow
3 the jury to review it for the context and content of the would-be
4 inconsistencies and decide for themselves.

5 Along with NRS 47.120, those statements in the recording that were
6 inconsistent with trial testimony would be admissible under NRS 51.035(2)
7 and those statements that were consistent would also have been admissible to
8 rebut the claims of fabrication that were the crux of the defense case on cross
9 examination. There was no motive to fabricate for this girl as noted above.

10 The various theories of defense and prosecution as to these statements
11 and the lack of any objection to the above, other than the lone cumulative
12 objection, meant that this court must review this for plain error and a casual
13 reading must make it plain and unmistakable that these would-be hearsay
14 statements should not have been admitted and nothing could be further from
15 the truth. There are theories for each of them and given the parties' use of
16 such statements it was clearly for such purposes allowed under the law and in
17 furtherance of the defense case in particular as they specifically attempted to
18 utilize the child's statements to Rangel and Marshowsky that they deemed
19 inconsistent to their supposed advantage when placed up against her trial
20

1 testimony. The jury listened to the child's testimony, and they weighed these
2 inconsistencies, and they believed the child. The Defendant's substantial
3 rights were not affected. There was no error.

4 II. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE
5 CONVICTION.

6
7 "When determining whether a jury verdict was based on
8 sufficient evidence to meet due process requirements, we will inquire
9 "whether, after viewing the evidence in the light most favorable to the
10 prosecution, any rational trier of fact could have found the essential
11 elements of the crime beyond a reasonable
12 doubt."" Id. (quoting Origel-Candido v. State, 114 Nev. 378, 381, 956
13 P.2d 1378, 1380 (1998) (quoting Koza v. State, 100 Nev. 245, 250, 681
14 P.2d 44, 47 (1984))). The jury's verdict will not be disturbed on appeal
15 when there is substantial evidence supporting it. LaPierre v. State, 108
16 Nev. 528, 530, 836 P.2d 56, 57 (1992). We have previously held that in
17 sexual assault cases a "victim's testimony alone is sufficient to uphold
18 a conviction." Rose v. State, 123 Nev 194, 203, 163 P.3d 408, 414
19 (2007). This court has further recognized that "child victims are often
20 unable to articulate specific times of events and are oftentimes reluctant

1 to report the abuse to anyone until quite some time after the
2 incident." LaPierre, 108 Nev. at 531, 836 P.2d at 58. ""

3 Vega v. State, 126 Nev. 332, 342-43, 236 P.3d 632, 639 (2010).

4 Mentaberry does not engage this standard in his brief. Instead, he
5 argues the case in the light most favorable to the defense when he asks this
6 Court to only believe that Mentaberry touched A.P.'s stomach because it is
7 the "essence of A.P.'s consistent testimony." This is not the standard. The
8 reviewing court is to review the record as a whole, in a light most favorable
9 to the State. When done properly in this case there is clearly sufficient
10 evidence to sustain a conviction for Lewdness with a 14- or 15-year-old Child.
11 For Mentaberry to say that there was "no evidence... to suggest that he
12 intended to or did arouse himself, arouse A.P. or gratify any "lust, passion, or
13 sexual desire" is unbelievable. He touched A.P.'s breast, stomach and vagina
14 all under her clothes and while he was intoxicated. He asked to use his mouth
15 on her, clearly a sexual gesture. The emotional and emphatic way that A.P.
16 testified spoke to the jury, clearly that is what happened here, not that the jury
17 only found that he had touched her stomach. AA Vol. 1 p. 146, 148, 151, 153.

18
19 As noted above in the statement of facts, A.P. went to the defendant's
20 house on New Year's Eve 2017. A.P. had never met Mentaberry before that

1 day. AA Vol. 1 p. 1-2, 127-128, 135, 156, 165. That while there she was
2 touched on her stomach first, then her breasts and then her vagina, all under
3 her clothing and against her will. Id. 130-132. Mentaberry even knew her
4 age, 14 years old, and asked to place his mouth on her. Id. Dr. Piasecki opined
5 that A.P.'s behavior and disclosures were consistent with someone who has
6 been sexually assaulted. Id. at 217-221. Ms. Rangel and the victim's mother
7 testified about the behavioral changes they had witnessed in A.P. since the
8 date of this crime which Dr. Piasecki said that such behaviors are consistent
9 with someone who has suffered a sexual assault. Id. at 206-207, 217-221, 235-
10 236. Furthermore, the other child witness, A.H. testified and corroborated the
11 statements of A.P. placing her and Mentaberry in close proximity on the
12 couch, A.P. crying, and her partial disclosure which again is a normal part of
13 children disclosing sexual assaults like this. AA Vol. 1 p. 185-190. When the
14 appropriate standard is applied it is clear that there was ample evidence of the
15 elements of NRS 201.230.

16 CONCLUSION

17 This court should not review the first two issues as they are
18 discretionary and based upon this record do not merit plain error review.
19 There is simply no evidence the jurors had any bias, and neither were
20 challenged for cause by either party at trial. The hearsay was admissible under

1 a number of theories noted above and there were no objections based on
2 hearsay to the admissibility of the evidence.

3 Finally, there is ample evidence in the record regarding each element
4 of the crime of NRS 201.230. The work of the district court and that of the
5 jury should be affirmed.

6 RESPECTFULLY SUBMITTED this 1 day of July 2022.

7 TYLER J. INGRAM
8 Elko County District Attorney

9 By: 
10 Chad B. Thompson
11 Chief Deputy District Attorney
12 State Bar Number: 10248

13 CERTIFICATE OF COMPLIANCE

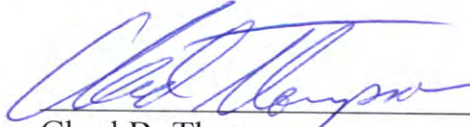
14 I hereby certify that this Respondent's Answering Brief complies with
15 the formatting requirements of NRAP 32(a)(4), the typeface requirements of
16 NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6). This
17 Respondent's Answering Brief has been prepared in a proportionally spaced
18 typeface using Microsoft Office Word 2007, in size 14-point Times New
19 Roman font.
20

1 I further certify that this brief complies with the page or type-volume
2 limitations of NRAP 32(a)(7) because, excluding the parts of the Respondent's
3 Answering Brief exempted by NRAP32(a)(7)(C), because it contains 6772
4 words.

5 I hereby certify that I have read the Respondent's Answering Brief, and
6 to the best of my knowledge, information, and belief, it is not frivolous or
7 interposed for any improper purpose. I further certify that this brief complies
8 with all applicable Nevada Rules of Appellate Procedure, in particular NRAP
9 28(e), which requires every assertion in the brief regarding matters in the
10 record to be supported by appropriate references to the record on appeal. I
11 understand that I may be subject to sanctions in the event that the
12 accompanying brief is not in conformity with the requirements of the Nevada
13 Rules of Appellate Procedure.

14 DATED this 1 day of July 2022.

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