IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD EDWARD PHILIPPI, JR.,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35733

FILED

NOV 14 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of sexual assault of a child under the age of 16 years. The district court sentenced appellant Donald Philippi, Jr. to serve two consecutive terms of life in prison with the possibility of parole.

Philippi was charged with sexually assaulting his teenage stepdaughter in the periods from January 1994 to September 1996 and September 1996 to February 1997. In a statement to the police, Philippi denied having any sexual relations with his stepdaughter prior to 1996 and admitted having consensual sexual relations with her in 1996 and 1997. The defense theory of the case was that Philippi was guilty of statutory sexual seduction, rather than sexual assault. The victim testified that Philippi began touching her inappropriately in 1990 when she was eight years old. The victim made various contradictory statements regarding her relationship with her step-father. At different periods in time, she has indicated that no sexual activity took place, that the activity occurred but was consensual, or that the activity occurred but it was not consensual.

Philippi first contends that the district court erred in admitting into evidence the October 1995 prior consistent statement of the victim. Philippi did not object to the admission of the statement. Philippi argues the admission of the statement constitutes plain error, and is therefore subject to review by this court despite his failure to object below.

"Generally, the failure to object at trial precludes review by this court; however, this court may address plain error sua sponte."[1] Plain error is that which is "so unmistakable that it reveals itself by casual inspection of the record."[2] We do not perceive this to be plain error.

Prior consistent statements are inadmissible hearsay unless they are offered to rebut an implied charge of fabrication.[3] This court has held that, in order for a prior consistent statement to be admissible, it "must have been made at a time when the witness had no motive to fabricate."[4]

The prior consistent statement made by the victim in this case was written at a time when she had no motive to fabricate insofar as it was written before Philippi had told anyone about his sexual relationship with her and prior to any charges in this matter. Thus, she had no reason to say that the sexual relationship was nonconsensual in order to avoid censure from her family over her relationship with Philippi.

Philippi also argues that the victim retracted the statement and, at the time of the retraction, the victim indicated she made the statement because she thought it would help her to remain with her grandmother. Thus, Philippi contends she also had a motive to fabricate at the time the statement was made. We have previously held that where the charge of fabrication arises primarily from facts occurring after the statement, the fact that there may have been a motive to fabricate before the statement does not necessarily render the statement inadmissible.[5] Therefore, we conclude that the district court did not commit plain error by admitting the October 1995 statement.

Second, Philippi contends that the trial court committed reversible error by denying his request for an evidentiary hearing

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[1]Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 988 (1995) (citing Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992)).

[2]Torres v. Farmers Insurance Exchange, 106 Nev. 340, 345 n.2, 793 P.2d 839, 842 (1990) (quoting Williams v. Zellhoefer, 89 Nev. 579, 580, 517 P.2d 789, 789 (1973)).

[3]See NRS 51.035(2)(b).

[4]Patterson, 111 Nev. at 1532, 907 P.2d at 989 (citing Daly v. State, 99 Nev. 564, 665 P.2d 798 (1983)).

[5]Cunningham v. State, 100 Nev. 396, 399, 653 P.2d 500, 502 (1984).

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pursuant to this court's decision in Miller v. State.[6] During trial, Philippi sought to introduce evidence that the victim had allegedly made a false report to Child Protective Services that one of Philippi's male friends had engaged in inappropriate sexual activity with a female child other than the victim. Without holding a hearing, the district court sustained the State's objection to the offer of proof, ruling that the report was not relevant or material and that its probative value was outweighed by its prejudicial effect.

This court's decision in Miller requires a defendant in a sexual assault case to file written notification of his intention to cross-examine a victim about prior false sexual assault allegations involving the victim.[7] The decision establishes a limited exception to the general rule that extrinsic evidence of specific conduct may not be introduced to challenge a witness' credibility in a sexual assault case and clarifies that the rape shield laws are not implicated by cross-examination about prior false allegations.[8]

Neither Miller, nor the rape shield laws, apply to the instant case. Philippi did not desire to question the victim about her own sexual conduct or allegations that she had made previous false accusations of sexual assault committed upon her. Nothing prohibited Philippi from asking the victim if she made a false report to Child Protective Services. If she had denied making the report, Philippi would be prohibited from introducing extrinsic evidence to contradict her statement unless he could demonstrate the evidence was not a form of collateral impeachment.

Based upon the offer of proof presented, the district court concluded that it was unclear that the victim was the source of the report or that the person reporting was deliberately filing a false report. Although the district court and all counsel discussed Miller, it appears the district court concluded that recalling the victim to ask about the report was akin to impermissible collateral impeachment and therefore irrelevant. The determination of whether to admit evidence is within the sound discretion of the district court. We will not disturb the

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[6]105 Nev. 497, 779 P.2d 87 (1989).

[7]Id. 105 Nev. at 502, 779 P.2d at 90.

[8]Id. 105 Nev. at 501, 779 P.2d at 90.

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determination of the district court unless it is manifestly wrong.[9] We conclude the district court was not manifestly wrong in excluding this evidence.

Next, Philippi contends that he was unduly prejudiced by the admission of other uncharged sex acts. Specifically, Philippi contends that district court erred in allowing the victim's testimony about sexual acts involving the victim and Philippi that occurred between 1990 and 1994. After conducting a hearing, the district court determined the evidence was admissible pursuant to NRS 48.035(3) and NRS 48.045(2). This court extends substantial weight to a trial court's decision to admit or exclude evidence on this basis and will not reverse absent manifest error.[10]

While the admissibility of some of the acts under NRS 48.035(3) and the res gestae doctrine is a close question, we conclude that the uncharged acts meet the requirements for admissibility set forth in Petrocelli v. State.[11] The prior relationship between Philippi and the victim was relevant to the victim's ability to consent to the sexual acts and the State's theory that Philippi manipulated and dominated the victim. The district court did not abuse its discretion by admitting the uncharged acts.

Next, Philippi contends that he was unduly prejudiced by the admission of letters he wrote to the victim after the dates charged in the information. Philippi wrote letters to the victim after Feburary 1, 1997. He was charged with sexually assaulting the victim between January 1, 1994 and February 1, 1997. We give great weight and deference to the district court's determination to admit evidence and will not reverse absent manifest error.[12] Therefore, after reviewing the record, we conclude that the district court did not abuse its discretion in admitting the letters. The letters demonstrated the nature of the relationship

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[9]Bletcher v. State, 111 Nev. 1477, 1479-80, 907 P.2d 978, 980 (1995) (citing Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992)).

[10]Id.

[11]101 Nev. 46, 692 P.2d 503 (1985); see also Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

[12]See Bletcher, 111 Nev. at 1480, 907 P.2d at 980 (citing Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992)).

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between the victim and Philippi and his continued attempts to manipulate the victim.

Philippi further contends that the trial court erred in allotting him only four peremptory challenges. Philippi failed to raise this issue before the district court. However, he contends the failure of the district court to allow him eight peremptory challenges constitutes plain error that we may address upon appeal. We disagree.

Count I of the information charged Philippi with the crime of sexual assault upon a child under the age of 16 years.[13] The crime was alleged to have been committed between January 1994 and September 1996. The penalties for violating NRS 200.366 were changed by the 1995 Legislature. For crimes committed prior to July 1, 1995, the sentence was life in prison or a definite term of no less than 5 years. However, for crimes committed after July 1, 1995, the punishment was changed to life imprisonment if the victim was under 14 years of age. The victim in this case turned 14 on February 2, 1996. Therefore, depending on when the jury found the sexual assault to have occurred, life imprisonment might arguably be the only sentencing option.

We conclude the district court did not err in permitting Philippi four peremptory challenges pursuant to our decision in Nootenboom v. State.[14] Because the crime could have occurred after the victim's 14th birthday, or before July 1, 1995, and the jury was not asked to make a specific finding on the date of the assault, Philippi could not have been sentenced under the stricter provision of the law.[15] Indeed, Philippi argued, and the district court agreed, that Philippi be sentenced under the pre-1995 statute. Philippi could have received a sentence less than life

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[13]NRS 200.366.

[14]82 Nev. 329, 332-33, 418 P.2d 490, 491 (1966) (concluding that a defendant is entitled to eight peremptory challenges only when no shorter sentence than life may be imposed).

[15]See, e.g., Shrader v. State, 101 Nev. 499, 505-06, 706 P.2d 834, 838 (1985) (Rule of lenity requires ambiguity in criminal statutes to be construed in favor of the accused).

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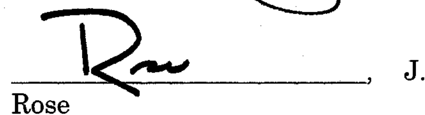
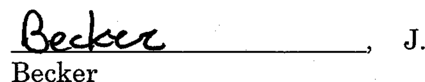
imprisonment and Noontenboom was the controlling law at the time of his trial.[16]

Lastly, Philippi contends that there was insufficient evidence to support his convictions. "[W]hen the sufficiency of the evidence is challenged on appeal in a criminal case, '[t]he relevant inquiry for this court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."'"[17] Our review of the record reveals sufficient evidence from which the jury, acting reasonably and rationally, could have found the elements of sexual assault beyond a reasonable doubt. Accordingly, we conclude that Philippi's convictions were supported by substantial evidence.

ORDER the judgment of the district court AFFIRMED.

_______________, J.
Shearing


_______________, J.
Rose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Becker

cc: Hon. William A. Maddox, District Judge
Robert B. Walker Jr.
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk

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[16] We note that our decision in Morales v. State, 116 Nev. 19, 992 P.2d 252 (2000), allows eight peremptory challenges whenever a life sentence may be imposed upon conviction of an offense. However, Morales is inapplicable to this case due to the fact that the decision explicitly states that its application is prospective and not retrospective and that Philippi's trial preceded our decision in Morales.

[17] Hutchins v. State, 110 Nev. 103, 107-08, 867 P.2d 1136, 1139 (1994) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); see also McNair v. State, 108 Nev. 53, 61, 825 P.2d 571, 577 (1992) (circumstantial evidence alone may support a conviction).

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