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Sena (Christopher) v. State, 138 Nev. Adv. Op. 34 (May 26, 2022)

Servando Martinez

Sena (Christopher) v. State, 138 Nev. Adv. Op. 34 (May 26, 2022)[1]

STATUTE OF LIMITATIONS: APPLICABILITY OF NRS 171.095 IN PROLONGED SEXUAL ABUSE CASES

Summary

In an opinion drafted by Justice Herndon, the Court clarified their application of the statute of limitations to crimes involving sexual abuse of children, concluding that the statute of limitations did not preclude any of the charges originally brought against Sena and that, under the doctrine of lenity, the unit of prosecution is per victim, not per instance. Therefore, the Court vacated six of the nine incest convictions, two counts of possession of visual presentation depicting the sexual conduct of a child, and one count of child abuse or neglect. The Court ultimately remanded this case for further proceedings.

Background

This opinion comes from an appeal from an Eighth Judicial District Court final judgment of conviction of 1 count of conspiracy to commit sexual assault, 16 counts of lewdness with a child under the age of 14, 19 counts of sexual assault of a minor under 16 years of old, 9 counts of incest, 8 counts of open or gross lewdness, 11 counts of sexual assault, 3 counts of preventing or dissuading a witness or victim from reporting a crime or commencing prosecution, 3 counts of child abuse, neglect or endangerment via sexual abuse, 5 counts of use of a minor in producing pornography, 7 counts of possession of visual presentation depicting the sexual conduct of a child, 2 counts of child abuse, neglect or endangerment via sexual exploitation, 1 count of use of a minor under the age of 14 in producing pornography, and 1 count of use of a minor under the age of 18 in producing pornography. Prior to this case, Sena began a family with his first wife

[1] By Servando Martinez.

beginning in 1987, but ultimately got divorced in 1997. Eventually, Sena, along with his first wife, second wife, first wife's new husband, and all of their children moved in with one another. Over time, Sena had begun to physically abuse all four children in the home. In 2001, the abuse became sexual towards one of the children and Sena subjected the then-11-year-old, AS, to sexual abuse almost every day. After AS graduated high school, Sena began to sexually abuse the other children, as well as involving his previous wives, Terrie and Deborah, in the sexual abuse towards his children. Sena would also attempt to involve other children and would film the sexual encounters he had with his children. In 2014, one child revealed to the oldest child, AS, now 24, that Sena continued to sexually assault her brothers. This encouraged them to flee the home and report Sena's actions to law enforcement. Sena was charged with 120 counts pertaining to his various acts of physical and sexual abuse. He unsuccessfully moved to dismiss counts 2- 53 concerning AS, arguing they were barred by the statute of limitations. The jury convicted Sena of 95 counts, and he was sentenced to serve concurrent and consecutive prison terms totaling 327 years and 4 months to life in the aggregate.

Discussion

Sena challenged his convictions on multiple fronts. He contended, (1) that numerous counts were barred by the statute of limitations; (2) that there were multiple convictions for the same offense related to the counts of incest, possession of child pornography and child abuse, neglect or endangerment related to the incident with Deborah and TS in the shower; (3) that evidence was not sufficient enough to support the conspiracy to commit sexual assault and the counts related to the videos of Terrie's nieces in the shower; (4) that his convictions for open and gross lewdness violated the Double Jeopardy Clause because they were lesser-included offenses

of child abuse, neglect or endangerment; and (5) that the district court violated his constitutional rights by partially closing the courtroom during the jury trial.

Statute of Limitations

Sena asserted that many of the counts alleged against him for crimes committed between 2001 and 2014 were barred by the statute of limitations. The Court, however, was dissuaded by this argument and noted that because of the repugnant nature of sex crimes against a child, the crime "is almost always intended to be kept secret."[2] With this rationale, the Court held that, as for the applicable standard of review, "[i]f substantial evidence supports a trier of fact's determination that a crime was committed in a secret manner, we will not disturb this finding on appeal," detailing that this approach "realistically recognizes that a wrongdoer can perpetrate a secret crime by threatening anyone with knowledge to remain silent about a crime and prevents the wrongdoer from unfairly manipulating the statute of limitations to his advantage."[3]

Challenged counts addressed in the motion to dismiss (counts 2-53)

The Court recognized that Sena adequately preserved the statute of limitations issue as to counts 2-53 because he moved to dismiss them before trial, thus entitling him to de novo review for these counts.

Counts 2-30, 40, and 52

NRS 171.095(1)(a) states that if a covered crime "is committed in a secret manner," charges must be filed within the relevant periods of limitation "after the discovery of the offense, unless a longer period is allowed by paragraph (b)." The Court used this statutory language to

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[2] NEV. REV. STAT. 171.095; *see also* State v. Quinn, 117 Nev. 709, 715-16, 30 P.3 1117-19, 1121-22 (2001).
[3] Walstrom v. State, 104 Nev. 51, 57, 752 P.2d 225, 229 (1988).

qualify, for the time period applicable to these charges, if the victim of a crime constituting child sexual abuse discovered or should have discovered that they were a crime victim prior to turning 21, considering the crime's statute of limitations was only tolled until that victim turned 21 years old. The district court applied NRS 171.095(1)(a)'s tolling provision to counts 2-52, concluding that because Sena conducted the crimes in a secret manner, the statute of limitations was tolled until AS discovered the crimes. The Court, however, found that the district court erred because NRS 171.095(1)(a) clearly provides that it is applicable only if NRS 171.095(1)(b) does not provide a longer tolling period.[4] The Court had to determine whether a longer tolling period was applicable under NRS 171.095(1)(b), as well as what constitutes a child sexual abuse victim's "discovery" of the crime.[5] The Court ultimately held that because AS's silence was induced by the threats Sena made against her and her brothers, AS did not legally discover the crimes against her until she was able to flee Sena's home in June 2014 at 24 years of age, which means that NRS 171.095(1)(a) would provide tolling until that point. After that, the relevant limitation period for each count would begin to run. This conclusion means that NRS 171.095(1)(b) was the applicable section for all counts other than the sexual assault counts, and the district court erred in concluding that NRS 171.095(1)(a) applied to these counts. Nevertheless, the Court clarified that this error did not affect the ultimately correct conclusion that these counts were filed within the applicable statutes of limitations, as these counts were first filed in 2014, well before the limitation period expired.

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[4] NEV. REV. STAT. 171.095(1)(a).
[5] *See supra* note 2.

Counts 31-44 and 46-51

The Court further concluded that the fact that Deborah participated in some of these crimes and thus had knowledge of them did not render the crimes "discovered" because Deborah was acting in *pari delicto* with Sena. Thus, the Court held that the district court correctly found that these crimes were tolled under NRS 171.095(1)(a) because they were committed in a secret manner and AS's discovery was thwarted until she fled Sena's house in June 2014.

Count 53

Count 53, which concerned Sena dissuading AS from reporting, commencing criminal prosecution, or causing Sena's arrest, is not covered by NRS 171.095(1)(b) because it is not an offense constituting sexual abuse of a child. The Court determined that the district court did not err in finding that the secret manner provision applied, and the statute of limitations for count 53 was tolled until AS escaped in June 2014.

Challenged counts not addressed in motion to dismiss (counts 1, 55, 57, 59, 69, 77, 99, 103, 105, 115, 117, and 118)

Because Sena never asserted arguments below regarding the statute of limitations for these charges, he has forfeited the issue as to these counts and was solely entitled to a plain error review.[6]

Victims' knowledge of the crimes alleged in counts 1, 55, 57, 77, 99, 103, and 105 did not constitute discovery, nor did Terrie and Deborah's knowledge

[6] NEV. REV. STAT. 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

Sena asserted the statute of limitations barred multiple counts because AS, TS, BS, and RS knew about the crimes, and Deborah or Terrie participated in or had knowledge of them. He argued that these crimes were discovered at the time they occurred, and the statute of limitations had therefore expired by the time charges had been filed. However, the Court used the fact that AS, TS, BS, and RS all testified that Sena would often threaten them and they would go along with whatever Sena told them to do because they were afraid of him, to add context to this issue. The Court used this to rationalize that these crimes were not discovered at the time they occurred, and the statute of limitations for each of these counts was therefore tolled since the charges associated with these crimes were filed well before the applicable limitation periods expired.

Counts 59, 69, 115, and 118

Because TS, EC, and TG each did not know they were being filmed, they could not have had knowledge that would in turn deem each crime discovered. As such, the statute of limitations for each of these counts was tolled, and the counts were filed well within the relevant statutes of limitations. Thus, the Court found that Sena failed to demonstrate plain error.

Count 117

Sena challenged count 117 (child abuse, neglect or endangerment for showing TG pornography) on a statute of limitations grounds as well. According to *Quinn*, discovery does not occur when the person with knowledge "is a child-victim under eighteen years of age and fails to report for the reasons discussed in *Walstrom*."[7] The Court used this precedent to find that Sena

[7] Quinn, 117 Nev. at 715, 30 P.3d at 1122; *See also* Walstrom v. State, 104 Nev. 51, 56, 752 P.2d 225, 228 (1998), which recognizes that child sex abuse crimes involve emotional and psychological manipulation of a child that can in turn implicitly discourage disclosure. 104 Nev. at 55, 752 P.2d at 228.

failed to demonstrate plain error with regard to whether count 117 was filed within the relevant statute of limitations.

Alleged multiple convictions for the same offense

Incest charges

Sena contended that six of his incest convictions must be vacated because he can only be convicted of one count of incest for each victim, instead of being convicted of numerous counts of incest for each sexual interaction with a victim. NRS 201.180 provides that "it is a felony for persons being within the degree of consanguinity within which marriages are declared by law to be incestuous and void who intermarry with each other or who commit fornication or adultery."[8] Although a plain reading of the statute does not reveal the appropriate unit of prosecution for incest because nothing in the statute on its face indicates whether it should apply on a per-relationship basis or on a per-act basis, the court detailed that there are two ways in which a person may violate NRS 201.180: (1) by marrying a relative within a certain degree of consanguinity, NRS 201.180(1), or (2) by committing fornication or adultery with a relative within a certain degree of consanguinity, NRS 201.180(2).[9] As is shown by *Seymour, Douglas,* and *Guitron*, none of the existing caselaw specifically defined the proper unit of prosecution for NRS 201.180, and mixed approaches were applied originally.[10] After discussing the drawbacks of these cases, the Court concluded that because there is "a dearth of legislative history that speaks to the question, the caselaw that has applied NRS 201.180 reflects a variety of approaches, and public policy arguments do not provide clear guidance on how to interpret the

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[8] NEV. REV. STAT. 201.180; *see also* Castaneda v. State, 132 Nev. 434, 437, 373, P.3d 108, 110 (2016) ("[D]etermining the appropriate unit of prosecution presents an issue of statutory interpretation and substantive law.")

[9] *Id.*

[10] Guitron v. State, 131 Nev. 215, 220, 350 P.3d 93, 96-97 (Ct. App. 2015); Douglas v. State, 130 Nev. 285, 286, 327 P.3d 492, 493 (2014); State v. Seymour, 57 Nev. 35, 38, 57 P.2d 390, 391 (1936).

statute." Thus, the Court utilized the rule of lenity acknowledging that it requires them to construe the ambiguous statute in Sena's favor. Therefore, Sena was only charged with three counts of incest, one for each victim.[11]

Possession of child pornography charges

Because Sena specifically admitted guilt in his closing argument as to counts 78, 100, 104, 119, and 120, he has waived the ability to challenge those. Under NRS 200.730, it is unlawful to knowingly and willfully possess "any film, photograph or other visual presentation depicting a person under the age of 16 years as the subject of a sexual portrayal."[12] Here, the charging document alleged that Sena possessed all the images on the same date: September 18, 2014. This alone undercut the States argument for multiple acts of possession. Therefore, the Court concluded that counts 60 and 116 must be vacated, as they are redundant of the other charged possession of child pornography counts for which guilt was specifically conceded at trial, namely counts 78, 100, 104, 119, and 120.

Child abuse, neglect or endangerment via sexual abuse charges

Sena challenged count 57 (child abuse, neglect, or endangerment related to Deborah and TS having sex in the shower) as redundant to count 55 (child abuse, neglect or endangerment related to Deborah and TS bathing each other in the shower). A person is guilty of abuse, neglect or endangerment of a child if the person "willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of

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[11] *See* Firestone v. State, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004) ("Criminal statutes must be strictly construed and resolved in favor of the defendant." (internal quotations omitted)).

[12] NEV. REV. STAT. 200.730.

abuse or neglect."[13] *Rimer v. State* held that child abuse and neglect was a continuing offense because of its "cumulative nature."[14] Because NRS 200.508 is a continuing offense, it was only appropriate to charge one count of abuse, neglect or endangerment via sexual abuse for the incidents with Deborah and TS in the shower. The existing law states that the crime continues until the abuse stops. With that said, the Court concluded that count 57 is redundant of count 55 and must be vacated.

Sufficiency of the Evidence

Sena challenged the sufficiency of the evidence supporting the conspiracy to commit sexual assault count and the counts related to filming Terrie's nieces while they showered. In reviewing for sufficiency of the evidence, the appellate court must decide "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." [15]

There was sufficient evidence to support count 1, conspiracy to commit sexual assault

The Court also concluded that Deborah's and Terries repeated participation in the crimes over a period of years in connection with multiple children; Terries statements to police that she enjoyed partaking in the sexual abuse; Deborah's testimony that she continued to participate and did not report the crimes due to fear of prison time, diminishment of reputation, and loss of Sena's affection; and video evidence of Deborah and Terrie each individually discussing with Sena sex acts that they wished to perform upon one of the Sena children immediately before abusing the child, when considered together, is substantial evidence to support the conclusion

[13] NEV. REV. STAT. 200.508(1).
[14] Rimer v. State, 131 Nev. 307, 319, 351 P.3d 697, 707 (2015).
[15] Jackson v. Virginia, 443 U.S. 307, 319 (1979).

that there was indeed an agreement between Sena, Deborah, and Terrie. Using this, the Court determined that Sena's argument that any conspiracy that may have existed ended after the first assault also has no merit. “Nevada law defines a conspiracy as an agreement between two or more persons for an unlawful purpose.”[16]

There was sufficient evidence to support counts 115 and 118

Part of Shen’s argument includes the contention that the "sexual portrayal" language in NRS 200.710(2), which uses the definition provided in NRS 200.700(4), is unconstitutional.

NRS 200.700(4)’s definition of “sexual portrayal” and the use of “sexual portrayal” in NRS 200.710(2) are constitutional

The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance, and the Court has “sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.”[17]

There was sufficient evidence of a “sexual portrayal”

The Court concluded that there was sufficient evidence that each exhibit depicted a “sexual portrayal.” Sena filmed the girls from a voyeuristic point of view, focused on the girls’ genitals, had Terrie perform fellatio on him while he filmed the girls, and recorded a male voice, alleged to be Sena, breathing heavily and moaning during both videos, all of which would clearly allow a reasonable juror to find that Sena received sexual gratification from filming the girls.

Double Jeopardy

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[16] Nunnery v. Eighth Judicial Dist. Court, 124 Nev. 477, 480, 186 P.3d 886, 888 (2008) (internal quotations omitted).

[17] New York v. Ferber, 458 U.S. 747, 757 (1982).

Sena challenged three of his convictions for open or gross lewdness (counts 56, 58, and 82) as violating the Double Jeopardy Clause because they punish the same conduct as three of the child abuse, neglect or endangerment via sexual abuse convictions (counts 55, 57, and 81). The Double Jeopardy Clause protects against "multiple punishments for the same offense."[18] Open or gross lewdness requires the defendant to have committed an obscene, indecent, or sexually unchaste act that is glaringly noticeable or obviously objectionable and not in a secret manner, including in a manner intended to be offensive to the victim."[19] Because Sena could have committed child abuse, neglect or endangerment via sexual abuse without committing open or gross lewdness, the open or gross lewdness offense is not a lesser-included offense. Thus, because each crime requires proving an element that is not included in the other, the Court found that plain error did not occur.

Alleged courtroom "closure"

Sena also challenged the district court's direction to the gallery that no one was to come and go during witness testimony or during argument. The First and Sixth Amendments guarantee a right to a federal public trial, and the Fourteenth Amendment makes such rights applicable to trials at the state level as well.[20] The Court determined that the court never excluded people from or "closed" the courtroom; members of the public were always allowed to watch the proceedings and simply had to adhere to specific entrance and exit times. Thus, the Court held that the district court properly exercised its discretion in governing its own courtroom, and there was no

[18] Jackson, 128 Nev. at 604, 291 P.3d at 1278.
[19] Berry v. State, 125 Nev. 265, 280-82, 212 P.3d 1085, 1095-97 (2009).
[20] Presley v. Georgia, 558 U.S. 209, 211-12 (2010).

structural error warranting reversal, especially as these rules were put into place due to the extremely sensitive nature of the case facts.

Conclusion

While Sena challenged almost all of his convictions on multiple grounds, most of those challenges were meritless. The Court held that: the State filed all challenged charges within the appropriate applicable statutes of limitations; there was sufficient evidence to convict Sena of conspiracy to commit sexual assault and to support the criminal convictions related to Sena's filming of Terries nieces while they were in the shower; the convictions did not violate the tenets of double jeopardy and; the district court did not close the courtroom to the gallery during the jury trial. However, the Court did also conclude that some of Sena's convictions need to be vacated. Therefore, the Court affirmed the judgment of conviction for all of the challenged counts except counts 27, 32, 37, 42, 47, 57, 60, 75, and 116, which are now vacated.