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Alfaro v. State of Nevada, 139 Nev. Adv. Op. 24 (Aug. 24, 2023)

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COURT REVIEWED MULTIPLE EVIDENTIARY AND SENTENCING ISSUES RELATED TO DEFENDANT’S SEXUAL ASSULT AND LEWDNESS CONVICTIONS.

Summary

The Nevada Supreme Court upheld Alfaro's convictions on seven counts of sexual assault and two counts of lewdness with a minor under the age of 14. Alfaro challenged the sufficiency of the evidence and argued that some counts were redundant and cited evidentiary and jury instruction errors. The Court reversed one conviction for lewdness as redundant and remanded for correction of the judgment. The Court upheld Alfaro’s remaining nine convictions, deeming there was adequate evidence to support the charges.

Background

The victim, ED, was a minor under the age of 14 years of age at the time of the assaults. The defendant, Alfaro, had a close relationship with ED’s family. ED’s biological parents, affected by addiction and homelessness, often entrusted their son and daughter to Alfaro. The incidents of abuse against ED took place over a seven-month span in 2015 when Alfaro shared a motel room with ED, her brother, and their father.

ED accused Alfaro of forcing her to fellate him and penetrating her vaginally with his penis and fingers and anally with his penis, fingers, and a Sharpie pen. ED said that before the assaults Alfaro would give her muscle relaxants ED disclosed the abuse to a family friend, which led to an investigation by Child Protective Services and law enforcement and an examination conducted by Dr. MacLeod. The examination resulted in no genital trauma. Alfaro agreed to be interviewed by Detective Harms. Alfaro supported some of the details mentioned by ED, but he denied the accusations of abuse. ED mentioned that Alfaro took nude pictures of her, but Detective Harms did not find any nude pictures.

ED was 9 years old at the time of the assaults and the trial took place 6 years later when ED was 15. Alfaro was convicted by a jury for seven counts of sexual assault against a child under 14 and three counts of lewdness with a child under 14. On appeal, he attempts to contest the verdict on the grounds of insufficient evidence, the introduction of prior misconduct evidence, and errors in jury instruction.

Discussion

I. The circumstances that led to the charges.

A. The relationship between Alfaro and ED and their shared living situation set the stage for the sexual assaults, resulting in a formal investigation.

The close relationship between Alfaro and ED’s family led to him taking care of ED and her younger brother. While ED’s parents were experiencing homelessness Alfaro shared a motel room with ED, her brother, and her father. It was during this time that the sexual assaults occurred. ED accused Alfaro of forcing her to fellate him and penetrating her vaginally with his penis and fingers and anally with his penis, his fingers and a Sharpie pen. ED disclosed the abuse to a friend, which led to an investigation by Child Protective Services and law enforcement.

¹ By Ciara Clark.

Alfaro's interview with Detective Harms supported some of the details mentioned by ED, but he denied the accusations of abuse.

B. The State brought multiple charges against Alfaro based on specific incidents from 2015, incorporating evidence of uncharged acts and culminating in a jury trial and conviction in 2021.

The State charged Alfaro with eight counts of sexual assault against and three counts of lewdness with a minor under 14 years old from June through December of 2015. Before trial, the court allowed evidence of four uncharged acts under NRS 48.045(3) and NRS 48.035(3).² Under NRS 48.045(3) two acts were admitted as prior uncharged sexual offenses, the suspect taking nude photos of victim and giving her muscle relaxant.³ Under NRS 48.035(3) the acts of showing the victim pornography and dressing the victim in fishnet stockings, were admitted as *res gestae*.⁴ The trial did not start until 2021 when the victim was by then 15 years old. During closing the State abandoned one count and the jury convicted Alfaro on all seven charges.

II. The questioning of the sufficiency-of-the-evidence.

In Alfaro's appeal, he argued that the evidence presented against him was insufficient for a conviction under the Due Process Clause of the Fourteenth Amendment. The clause necessitates sufficient proof, beyond a reasonable doubt, addressing each element of the alleged offense.⁵ When reviewing the sufficiency of evidence, courts ask whether any rational trier of fact could establish the crime's essential elements beyond a reasonable doubt.⁶

A. Alfaro's arguments on evidence sufficiency.

Alfaro presented two primary arguments questioning the sufficiency of the evidence. First, he claimed that the State failed to convincingly demonstrate that he subjected the victim to "sexual penetration," which is required under NRS 200.366(1).⁷ This was crucial for the charges against him in counts I, III, IV, and VII, which described multiple instances of assault involving various acts of penetration.

Second, Alfaro highlighted the absence of corroborative evidence.⁸ Alfaro contended that the victim, ED, did not provide testimony with enough detail to affirm the convictions, necessitating a reversal on all charges.

In response, the State drew upon the definitions in NRS 200.366(1) (2007) and NRS 200.364(5) (2013), clarifying the scope of sexual penetration.⁹ Even though Alfaro referenced moments in ED's testimony where she expressed uncertainty or outright denial of certain acts, he overlooked her subsequent detailed explanations, especially to third parties. These statements suggested that some form of penetration, no matter how minimal, transpired. Even if ED had difficulty recalling exact details six years after the assaults, her previous statements remained admissible as substantive evidence.

² NEV. REV. STAT. NRS 48.045(3) (2015); NEV. REV. STAT. NRS 48.035(3) (1979).

³ NEV. REV. STAT. NRS 48.045(3) (2015).

⁴ NEV. REV. STAT. NRS 48.035(3) (1979).

⁵ U.S. CONST. amend. XIV, § 2.

⁶ Jackson v. Virginia, 443 U.S. 307, 316 (1979).

⁷ NEV. REV. STAT. 200.366(1) (2021).

⁸ LaPierre v. State, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992).

⁹ NEV. REV. STAT. 200.366(1) (2007); NEV. REV. STAT. 200.364(5) (2013).

The Court concluded that a rational juror could infer penetration, no matter how slight, occurred.¹⁰ The Court further observed that a sexual assault victim's testimony alone can suffice for a conviction and that a child victim may not always recall events with precision. Given ED's distinct recollections and consistent disclosures to third parties, the Court ruled her testimony credible. As such, the Court found enough evidence to support the jury's verdict, and therefore dismissed Alfaro's arguments for reversal on all counts.

B. Challenge to lewdness convictions based on redundancy with sexual assault offenses.

Alfaro took issue with his three convictions pertaining to lewdness with a child under the age of 14, which are in accordance with NRS 201.230(1).¹¹ These convictions arose from the acts listed below.

1. Count IX: Touching or fondling E.D.'s breasts
2. Count X: touching or fondling her buttocks
3. Count XI: Kissing her on the lips

In his appeal, Alfaro argued that the State did not sufficiently distinguish these lewd acts from the acts that led to his convictions for sexual assault. He claimed the charges were redundant.

The State's burden, according to NRS 201.230(1), is to establish that lewdness with a child is a distinct offense from sexual assault.¹² Alfaro stated that the same act cannot be used as grounds for both sexual assault and lewdness convictions.¹³ In order for both crimes to be affirmed, the State needs to show that the lewd act was not incidental to the sexual assault and that they are "separate and distinct."¹⁴ There should be enough evidence for a reasonable juror to distinguish two distinct offenses, if the State doesn't provide this clear distinction, then the lewdness conviction should be considered redundant to the sexual assault conviction.¹⁵

The verdict on the acts charged in counts IX and X derived its legitimacy from both ED's testimony and Alfaro's own admission. Although Alfaro denied sexually assaulting ED, he confessed to having pinched her breasts and buttocks, an action he dismissed as horseplay. This was reinforced by Dr. MacLeod's testimony, suggesting that such actions can be construed as grooming behavior and are unambiguously inappropriate. As a result, the Court concluded that a rational juror beyond a reasonable doubt, could have distinguished the "lewd and lascivious" intent behind these acts from the sexual assaults. Consequently, they rejected Alfaro's redundancy objections for counts IX and X.¹⁶

Yet, the State did not present any compelling evidence to affirm Alfaro's conviction under count XI for kissing ED on the lips. This discrepancy emerged from the fact that ED testified only to a single instance where she woke up to Alfaro engaging in digital penetration and then kissing her. There was no concrete evidence presented to distinguish this act of kissing from the associated act of sexual assault. The Court resolved to reverse Alfaro's conviction under

¹⁰ NEV. REV. STAT. 200.364(5) (2013). *See* State v. Toohey, 816 N.W.2d 120, 129-31 (S.D. 2012).

¹¹ NEV. REV. STAT. 201.230(1) (2015).

¹² NEV. REV. STAT. 201.230(1) (2015).

¹³ Jackson v. State, 128 Nev. 598, 612, 291 P.3d 1274, 1283 (2012) (discussing Braunstein v. State, 118 Nev. 68, 79, 40 P.3d 413, 421 (2002), and Crowley, 120 Nev. at 33-34, 83 P.3d at 285); *See* State v. Koseck, 113 Nev. 477, 479, 936 P.2d 836, 838 (1997).

¹⁴ Gaxiola v. State, 121 Nev. 638, 651-53. 119 P.3d 1225, 1234-35 (2005).

¹⁵ *See* Jackson v. Virginia, 443 U.S. at 316.; Braunstein, 118 Nev. at 78-79, 40 P.3d at 420-2.1

¹⁶ NEV. REV. STAT. 201.230(1) (2015).

count XI, since the State did not adequately showcase the distinct nature of the lewd act from the charged sexual assault.¹⁷

III. Alfaro's evidentiary and instructional objections did not warrant a new trial

A. Use of prior misconduct evidence in sexual assault cases is defined in NRS 48.045(2) and NRS 48.035(3)

Despite Nevada's general rule which prohibits the use of prior misconduct to indicate criminal propensity, prosecutors often attempt to introduce evidence of a defendant's previous uncharged actions in sexual assault trials.¹⁸ The Nevada evidence code provides three methods to admit such evidence:

1. Using the evidence for a non-propensity purpose under NRS 48.045(2);
2. Allowing evidence of prior uncharged sexual offenses to suggest criminal propensity in a sexual offense trial under NRS 48.045(3); or
3. Permitting the introduction of evidence so closely linked to the charged act, it cannot be described separately, also referred to as *res gestae* evidence, under NRS 48.035(3).

The district court admitted evidence of four instances of Alfaro's uncharged misconduct. Two of the acts, taking nude photographs of ED and giving her a muscle relaxant were admitted under NRS 48.035(3).¹⁹ The other two, making ED wear fishnet stockings and watch pornography, were admitted as *res gestae* evidence. However, the district court erred in admitting evidence of the nude photographs and making ED wear fishnet stockings. Evidence of the nude photographs could not come in because its prejudicial effect outweighed its probative value, meaning that NRS 48.045(3) was inapplicable. The allegations concerning ED's fishnet stockings were also inadmissible because they did not occur concurrently with the sexual assaults; therefore, the fishnets could not act as *res gestae* to the sexual assaults.

i. Admissibility of Alfaro's prior misconduct evidence under NRS 48.045(3) exception and its proper evaluation in sexual offense cases.

NRS 48.045(3) presents an exception to the general prohibition in NRS 48.045(2) against using evidence of past wrongdoings to suggest criminal tendencies.²⁰ Specifically, NRS 48.045(3) allows the introduction of evidence of other separate sexual offenses in a prosecution for a sexual crime. Admitting such evidence is bound by four requirements.²¹

1. The uncharged act must constitute a sexual offense under NRS 179D.097;
2. It must be relevant to the charged offense; and
3. The district court must make a preliminary finding that "a jury could reasonably find by a preponderance of the evidence that the act had occurred";
4. Using the factors enumerated in *United States v. LeMay*, 260 F.3d 1018, 1028 (9th Cir. 2001).²²

¹⁷ See *Gaxiola*, 121 Nev. at 653, 119 P.3d at 1235-36.

¹⁸ NEV. REV. STAT. 48.045(2) (2015).

¹⁹ NEV. REV. STAT. 48.035(3) (1979).

²⁰ NEV. REV. STAT. 48.045(2) (2015).

²¹ *Franks v. State*, 135 Nev. 1, 7, 432 P.3d 752, 757 (2019).

²² *United States v. LeMay*, 260 F.3d 1018, 1028 (9th Cir. 2001).

These requirements involve the nature of the uncharged act, its relevance to the present charge, a preliminary assessment by the court of the act's occurrence based on preponderance of evidence, and a balancing of the evidence's probative value against its potential for unfair prejudice.²³

In Alfaro's case, the acts of taking nude photographs of a minor and giving the minor muscle relaxant prior to sexual contact satisfied the initial requirements.

However, the admissibility of the nude photographs comes into question due to the lack of substantive proof, especially when balanced against the risk of undue prejudice. Although there was evidence of Alfaro giving muscle relaxant to the minor, the absence of clear evidence regarding the nude photographs, given their potential inflammatory nature, was problematic.²⁴

Such an evaluation, should not be a mere checklist but a nuanced assessment. The probative value of evidence should be carefully evaluated in context, ensuring it's not simply inflammatory, unsupported, or redundant. Thus, while the muscle relaxer evidence was rightly admitted, the decision to admit the nude photograph evidence under the conditions presented was not justified.

ii. The application of res gestae under NRS 48.035(3) to acts committed by Alfaro requires precise adherence to defined parameters.

The State and the district court have asserted a broad understanding, positing that *res gestae* evidence can complete the picture, of the charged crime. However, the Court, underscores that the criterion for admitting evidence under this doctrine is extremely narrow.²⁵ The evidence must be so intertwined with the primary charged crime that separating the two becomes nearly impossible.

Within this framework, the Court distinguishes between two of Alfaro's acts. Making ED watch pornography is deemed in sync with the charged offenses, thereby fitting the *res gestae* definition since it transpired simultaneously and in the same locale as the primary offenses.

Conversely, the act involving fishnet stockings stands apart both in time and place and is hence rejected as *res gestae*. This differentiation highlights the acute necessity for a rigorous and precise application of the *res gestae* principle.

B. Although the District Court made errors in admitting certain evidence, such errors did not have a “substantial and injurious effect” on the jury’s verdict.

Initially, the Court noted the possibility of affirming erroneously admitted evidence if it could have been admitted differently or if the error's effect was insignificant on the jury's decision.

Assessing each evidence separately, the Court found that the evidence of the nude photographs, which was wrongfully admitted under NRS 48.045(3), could not have been introduced as *res gestae*.²⁶ This is because there was no clarity regarding the circumstances and timing of the photographs. Similarly, evidence in regards the fishnet stockings incident was

²³ *Id.* at 755-57.

²⁴ *United States v. LeMay*, 260 F.3d 1018, 1028 (9th Cir. 2001).

²⁵ *Weber v. State*, 121 Nev. 554, 574, 119 P.3d 107, 121 (2005), overruled on other grounds by *Farmer v. State*, 133 Nev. 693, 698, 405 P.3d 114, 120 (2017); see *Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005); *Sutton v. state*, 114 Nev. 1327, 1331, 972 P.2d 334, 336 (1998).

²⁶ NEV. REV. STAT. 48.045(2) (2015).

inappropriately accepted under NRS 48.035(3).²⁷ The Court remarks that it could not be included under NRS 48.045(3) as it doesn't align with a sexual offense as per NRS 179D.097.²⁸

Despite these observations, the Court pivoted to the core question: whether these evidentiary errors influenced the jury's verdict. Evaluating the overall record, the Court concluded that the relevance of the wrongfully admitted acts was minimal, and any prejudicial effect was overshadowed by the gravity of Alfaro's main charges. As a result, the Court determined the admission of these prior acts as harmless.

C. The district court's jury instruction on "lewdness" was erroneous, but it did not result in a miscarriage of justice.

Initially, Alfaro argued that the court made a mistake by not accepting his proposed instruction, which would allow the defense to make negative inferences based on the State's failure to call crucial witnesses.²⁹ However, the Court dismissed this argument, stating that just because Alfaro is permitted to make an argument does not mean he is entitled to a specific jury instruction reflecting it.

The second contention by Alfaro centered on jury instruction no. 23. He argued that this instruction, which defines lewdness conflicts with the statutory definition found in NRS 201.230, the statute under which he was charged.³⁰ Upon de novo review, the Court agreed with Alfaro: instruction no. 23 is indeed inconsistent with the law. The given instruction suggested that lewdness pertained to behavior that is obscene or indecent. In contrast, the statutory definition, as outlined in instruction no. 20, was comprehensive with four specific elements and did not need any elaboration. Instruction no. 23 missed out on the vital requirement of physical contact associated with "lewdness with a child." The omission potentially allowed the jury to convict Alfaro even if they believed he did not physically touch the victim. Despite this error, it was grounds for reversal.³¹

IV. Despite controversial sentencing remarks, Alfaro's sentence falls within statutory limits and is not unconstitutionally disproportionate.

First, Alfaro claimed the district court wrongly leaned on prior uncharged crimes when deciding the appropriate sentence. He pointed to district court judge's statement as evidence of this alleged error, suggesting the statement indicates the court was biased against him based on prior crimes. Here, the court interprets the comments as indicating that the judge was distressed by the nature of the crime itself, rather than showing prejudice stemming from unsubstantiated evidence or accusations.³²

Second, Alfaro contended that the duration of his sentence, which is 275 years to life, goes against the Eighth Amendment's prohibition of cruel and unusual punishment. However, the

²⁷ NEV. REV. STAT. 48.035(3) (1979).

²⁸ See Franks, 135 Nev. at 4-5, 432 P.3d at 756.

²⁹ Rimer v. State, 131 Nev. 307, 329, 351 P.3d 697, 713 (2015).

³⁰ Black's Law Dictionary; Berry v. State, 125 Nev. 265, 280, 212 P.3d 1085, 1095 (2009), overruled on other grounds by State v. Castaneda, 126 Nev. 478, 245 P.3d 550 (2010).

³¹ See Carver v. El-Sabawi, 121 Nev. 11, 14, 107 P.3d 1283, 1285 (2005) (noting that an instructional error is only reversible if it resulted in a miscarriage of justice").

³² Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

Court countered this by emphasizing that Alfaro's sentence is indeed within the bounds established by statutory law, specifically referencing NRS 200.366(3)(c) and NRS 201.230(2).³³

V. In assessing the combined effect of individual trial errors, the Court found that they did not compromise the fairness of Alfaro's trial, despite arguments pointing to their potential cumulative impact.

The Court evaluated if the amalgamated impact of individual errors, which were considered harmless individually, might have collectively violated Alfaro's right to a fair trial.³⁴ Two main issues were underlined: (1) the admission of evidence from two non-charged misconducts, and (2) the introduction of instruction no. 23. Here, the Court weighed factors like the narrowness of the verdict on guilt, the nature and volume of errors, and the severity of the charges.³⁵ The case's intricacy arose mainly from the differing testimonies of ED and Alfaro, with no substantial physical evidence supporting either side. The Court found that ED's testimony met appropriate for conviction and the district court considered her account credible and compelling.

In conclusion, the Court discerned that the errors in question bore minimal influence on the trial's overarching proceedings and final verdict, and dismissed the cumulative error claim. As a result, the Court upheld the majority of Alfaro's convictions, only reversing count XI due to insufficient evidence, directing the formulation of a revised judgment of conviction.

Conclusion

The Court reversed Alfaro's conviction under count XI because the State failed to present adequate evidence differentiating the act of kissing from the associated act of sexual assault. The Court found that while ED testified to Alfaro engaging in penetration and kissing her, no clear evidence distinguished the kissing from the sexual assault. Here, it was deemed necessary for the State to clearly differentiate between the acts to uphold both charges. The inability to do so resulted in the reversal of Alfaro's conviction for count XI, given that the act could not be presented as separate from the sexual assault.

³³ See Chavez v. State, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009); but see Sims v. state, 107 Nev. 438, 442, 814 P.2d 63, 65 (1991).

³⁴ Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002).

³⁵ Valdez v. Stale, 1.24 Nev. 1172, 1195, 196 P.3d 465, 481 (2008).