

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE CRUZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59962

FILED

OCT 08 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of second-degree murder with the use of a deadly weapon. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge. Appellant Jose Cruz challenges both his sentence of life in prison with the possibility of parole for his second-degree murder conviction and his sentence of fifteen years for the deadly weapon enhancement.

First, Cruz argues that the district court abused its discretion when imposing the sentences because he was only thirteen at the time and played a minor role in the murder. The record demonstrates that before sentencing Cruz to life with the possibility of parole, the district court considered these mitigating factors as well as Cruz' previous encounters with law enforcement, his behavior after the arrest, the impact on the victim's family, and the repeated attempts by members of the community to reach out to Cruz and provide a positive influence in his life and concluded that its duty to protect the community from Cruz outweighed the mitigating circumstances. The record also demonstrates that before sentencing Cruz to fifteen years for the deadly weapon enhancement, the district court considered the appropriate statutory factors in NRS 193.165(1) (providing that a court must consider: "(a) [t]he facts and

circumstances of the crime; (b) [t]he criminal history of the person; (c) [t]he impact of the crime on any victim; (d) [a]ny mitigating factors presented by the person; and (e) [a]ny other relevant information).” Accordingly, we conclude that the district court did not abuse its discretion in sentencing Cruz. See Deveroux v. State, 96 Nev. 388, 390, 610 P.2d 722, 723-24 (1980) (noting that this court affords the district court wide discretion in sentencing, and the degree to which the district court considers youth and other potentially mitigating offender characteristics is within that discretionary authority).

Similarly, Cruz argues that the district court violated his right to due process because it did not give him adequate notice as to which factors in NRS 193.165 it intended to rely upon at sentencing and therefore he was deprived of the right to defend himself. We conclude that the statute’s enumeration of factors that a sentencing court must consider sufficiently notifies the defendant as to what will be considered at sentencing, and therefore this contention is also without merit.

Second, Cruz argues that the district court abused its discretion because it sentenced two other participants in the crime to equal or lesser sentences than his despite the fact that he was only thirteen and played a minor role in the murder, whereas they were adults and played a more active role. We note that the same district judge sentenced all of the participants in this case and each time individually weighed the appropriate sentencing considerations. See Nobles v. Warden, 106 Nev. 67, 68, 787 P.2d 390, 391 (1990) (emphasizing that “sentencing is an individualized process; therefore, no rule of law requires a court to sentence codefendants to identical terms”). The district court concluded that the other participants’ age made them more culpable than

Cruz, yet found highly mitigating that they told the truth and assisted the State in prosecution of the shooter. Accordingly, we conclude that the district court did not abuse its wide latitude in sentencing Cruz to an equal or slightly greater sentence than the adult participants. See Deveroux, 96 Nev. at 390, 610 P.2d at 723-24.

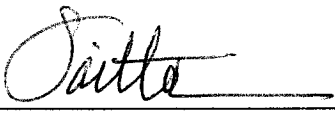
Third, Cruz argues that both of his sentences constitute cruel and unusual punishment because they are grossly disproportionate to the crime. While the unique characteristics of children must be considered differently than adults for the purposes of sentencing, the Eighth Amendment does not prohibit a sentence of life with the possibility of parole for juveniles. See Graham v. Florida, 560 U.S. ___, ___, 130 S. Ct. 2011, 2030 (2010) (holding that “[T]he Eighth Amendment does not foreclose the possibility that persons convicted of . . . crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society”). Moreover, while Cruz’ sentences are severe, they are not “so unreasonably disproportionate to the offense as to shock the conscience,” even considering his youth and his role in the offense. Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)). We also note that both sentences fall within the statutory limits, NRS 193.165; NRS 200.030 (5), and that the relevant statutes are constitutional. Culverson, 95 Nev. at 435, 596 P.2d at 221-22. Accordingly, we conclude that Cruz’ sentences do not constitute cruel and unusual punishment.

Fourth, Cruz argues that the district court relied upon impalpable evidence during sentencing and violated his right to free exercise of religion by referencing the bible. Cruz does not indicate what

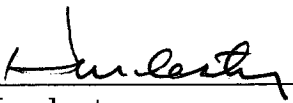
impalpable evidence the court erroneously considered, and we conclude that the district court only considered the relevant factors of the statute. We also conclude that the district court's fleeting reference to biblical passages did not deprive Cruz of his right to free exercise of religion. See Young v. State, 120 Nev. 963, 972, 102 P.3d 572, 578 (2004).

Having considered Cruz' contentions, and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Saitta


_____, J.
Pickering


_____, J.
Hardesty

cc: Hon. Patrick Flanagan, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk