IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BENJAMIN PAUL NARTER, A/K/A DENNIS MEYER; DAVID GOLD; DENNY MEYER; DENNY; AND DAVID, D/B/A NATIONAL MORTGAGE HELP CENTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71585

FILED

DEC 13 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Benjamin Paul Narter appeals from a judgment of conviction entered pursuant to a guilty plea of pattern of mortgage lending fraud. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

First, Narter argues his sentence of 48 to 120 months in prison constitutes cruel and unusual punishment because he was a non-violent, first-time offender who accepted responsibility for his actions and made efforts to pay restitution to the victims. Narter also argues the district court improperly failed to follow a carefully crafted negotiation between the parties because it misapprehended the strength of the State's case and formed its own opinion as to the public interest in the appropriate sentence.

Regardless of its severity, a sentence that is "within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" *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)); *see also Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion) (explaining the Eighth Amendment does not require strict proportionality between crime and

sentence; it forbids only an extreme sentence that is grossly disproportionate to the crime).

The sentence imposed falls within the parameters provided by the relevant statute. *See* NRS 205.372(2). Narter does not allege the statute is unconstitutional and he does not demonstrate his sentence was so disproportionate to the offense that it shocks the conscience. We conclude the sentence imposed is not grossly disproportionate to the crime and does not constitute cruel and unusual punishment.

Second, Narter appears to argue the district court abused its discretion when it imposed the sentence because it stated it was appalled the State recommended a term of probation for this crime. Narter also asserts the district court improperly emphasized the number of victims, the amount of restitution Narter owed to the victims, and the length of time Narter committed fraudulent activity while failing to acknowledge Narter's mitigation evidence.

We review a district court's sentencing decision for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). We will not interfere with the sentence imposed by the district court "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

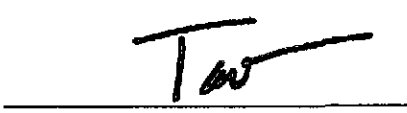
A review of the record reveals the district court did not base its sentencing decision on impalpable or highly suspect evidence. The district court heard the arguments of counsel and information regarding the defendant's actions in committing the fraudulent activities, his lack of criminal history prior to this matter, his mental health difficulties, and his attempts to pay restitution. The district court then noted there were multiple victims, Narter owed a large amount of restitution, and his

criminal activities "lasted for a considerable period of time." The district court concluded a prison term of 48 to 120 months was the appropriate sentence in this matter. Further, the decision to deny Narter's request for probation was within the district court's discretion, *see* NRS 176A.100(1)(c), and the district court was not required to follow the parties' sentencing recommendation. We conclude Narter fails to demonstrate his sentence was supported solely by impalpable or highly suspect evidence, *see Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996), and therefore we conclude the district court did not abuse its discretion when imposing sentence.

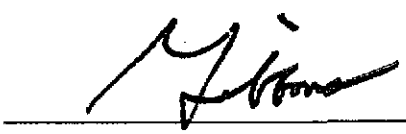
Third, in his reply brief Narter appears to argue the district court was improperly biased against him. However, Narter did not raise this claim in his opening brief and we decline to consider this claim because a reply brief is limited to answering new matters set forth in the answering brief. *See* NRAP 28(c); *Bongiovi v. Sullivan*, 122 Nev. 556, 569 n.5, 138 P.3d 433, 443 n.5 (2006).

Having concluded Narter is not entitled to relief, we ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Silver



_____, J.
Tao



_____, J.
Gibbons

cc: Hon. Carolyn Ellsworth, District Judge
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Attorney General/Carson City
Attorney General/Las Vegas
Eighth District Court Clerk