IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL OTIS GRIFFIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78082-COA

ORDER OF AFFIRMANCE

Michael Otis Griffin appeals from a judgment of conviction entered pursuant to a jury verdict of battery by strangulation on a person 60 years of age or older and battery resulting in substantial bodily harm on a person 60 years of age or older. Seventh Judicial District Court, White Pine County; Janet Berry, Senior Judge.

First, Griffin claims his convictions for (1) battery by strangulation on a person 60 years of age or older and (2) battery resulting in substantial bodily harm on a person 60 years of age or older both punish the same offense and therefore his sentences violate the Double Jeopardy Clause.

"A claim that a conviction violates the Double Jeopardy Clause generally is subject to de novo review." *Davidson v. State*, 124 Nev. 892, 896, 192 P.3d 1185, 1189 (2008). "The Double Jeopardy Clause protects against three abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *Jackson v. State*, 128 Nev. 598, 604, 291 P.3d 1274, 1278 (2012).

20-14796

Here, Griffin was prosecuted for two different offenses: In Count I, he was alleged to have committed battery by strangulation by applying pressure to the victim's neck and/or throat and thereby impeding the victim's normal breathing. And in Count II, he was alleged to have committed battery resulting in substantial bodily harm by hitting the victim on the face and head and by using force on the victim's hand, all of which caused prolonged physical pain and/or impairment. Because Griffin was prosecuted for, and the State presented evidence to support, two separate and distinct criminal acts, we conclude his convictions and sentences do not implicate the Double Jeopardy Clause. *Cf. Blockburger v. United States*, 284 U.S. 299, 302 (1932) ("Each of several successive [acts] constitutes a distinct offense, however closely they may follow each other.").

Second, Griffin claims his sentence constitutes cruel and unusual punishment. He argues that his sentence was not "'graduated and proportioned' considering the fact that the offenses . . . arose from the same primary cause of action." And he asserts that his consecutive habitual criminal sentences, for an aggregated prison term of 10 to 40 years, are disproportionate to his offenses and shock the conscience.

Regardless of its severity, a sentence that falls 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).

Here, Griffin's sentence falls within the parameters of the relevant statute, and he does not allege that the statute is unconstitutional. *See* NRS 207.010(1)(a). We note the district court has discretion to impose consecutive sentences. *See* NRS 176.035(1); *Pitmon v. State*, 131 Nev. 123, 128-29, 352 P.3d 655, 659 (Ct. App. 2015). And we conclude the sentence imposed is not so grossly disproportionate to Griffin's crimes and history of recidivism as to constitute cruel and unusual punishment. *See Ewing v. California*, 538 U.S. 11, 29 (2003) (plurality opinion) ("In weighing the gravity of [the defendant's] offense, we must place on the scales not only his current felony, but also his long history of felony recidivism.").

Third, Griffin claims the district court abused its discretion by considering irrelevant and unduly prejudicial testimony and evidence during its sentencing hearing.

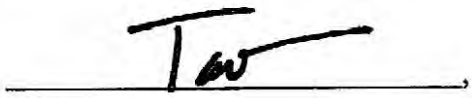
We review a district courts sentencing decision for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). The district court may "consider a wide, largely unlimited variety of information to insure that the punishment fits not only the crime, but also the individual defendant." *Martinez v. State*, 114 Nev. 735, 738, 961 P.2d 143, 145 (1998); *see also* NRS 176.015(6). However, we "will reverse a sentence if it is supported *solely* by impalpable and highly suspect evidence." *Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996).

Here, Griffin's sentence falls within the parameters of the relevant statute. *See* NRS 207.010(1)(a). He has not alleged the district court relied on impalpable or highly suspect evidence. And the record does not demonstrate his sentences were imposed to punish him for past

uncharged bad acts. Instead, the record shows the district court considered the seriousness of his current offenses and his history of violence before making its sentencing decision. Accordingly, we conclude the district court did not abuse its discretion at sentencing.

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

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. Janet Berry, Senior Judge
Jeff Kump, PLLC
Attorney General/Carson City
White Pine County District Attorney
White Pine County Clerk