IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THOMAS JASON BERNAL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82465-COA

ORDER OF AFFIRMANCE

Thomas Jason Bernal appeals from a judgment of conviction, pursuant to a jury verdict, of sexual assault of a child under the age of 16 years, not causing substantial bodily harm. Third Judicial District Court, Lyon County; John Schlegelmilch, Judge.

On July 14, 2019, Bernal told his wife, Patricia Bernal, that he had been inappropriately touching her daughter (Bernal's stepdaughter), H.S., who was 14 years old at the time.[1] Two days after Bernal told Patricia about the touching, she reported him to law enforcement. When H.S. was eventually interviewed by a forensic interviewer, she indicated that she thought the sexual assaults began when she was 12 years old.

Subsequently, Bernal agreed to be interviewed by Detectives Michael Messman and Marty Dues from the Lyon County Sheriff's Office at the Silver Springs substation. The interview lasted for approximately four and one-half hours, during which Bernal took three to four restroom breaks. Law enforcement did not provide Bernal with *Miranda*[2] warnings, but during the interview Bernal affirmed that he understood that he was free to leave at any time. He had also been told from the outset that he was

[1]We do not recount the facts except as necessary for our disposition.

[2]*Miranda v. Arizona*, 384 U.S. 436 (1966).

there voluntarily, to which he did not object or dispute. Near the end of the interview, Bernal confessed that his hand accidentally slipped while he was rubbing CBD cream on H.S.'s legs, and his finger entered her vagina.

Bernal was arrested and charged with three counts of sexual assault on a child under the age of 16 years, not causing substantial bodily harm, in violation of NRS 200.366(3)(b). Each count covered different date ranges, and the State presented different evidence as to each count: count I involved August 1, 2018, through June 30, 2019; count II involved July 1, 2019, through July 14, 2019; and count III involved December 1, 2018, through February 28, 2019.

Following a pretrial hearing, the district court granted the State's motion to admit Bernal's confession and to allow portions of the audio recording of the interview to be played to the jury. In its order, the district court determined "that the interview was not a custodial interrogation for the purposes of *Miranda*" and specifically found that Bernal's confession was voluntary.[3]

During a four-day jury trial, the jurors heard testimony from H.S.; Patricia; the forensic interviewer who had conducted an interview of H.S.; Detectives Messman and Dues; and various experts who testified about sexual abuse disclosure, false confessions, and reasons why an alleged victim would fabricate a disclosure, among other topics. Over Bernal's objection, the district court admitted testimony from Detective Messman about a dream Bernal had described during his interview in which an adult H.S. was pregnant with his child.

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[3]The district court found "that though there was an arrest made at the end of the interview, that was after Defendant's voluntary confession."

At the conclusion of the trial, the jury found Bernal not guilty on the first two counts, but guilty on the third involving the time frame of December 1, 2018, through February 28, 2019. The district court sentenced Bernal to life in prison with the possibility of parole after 25 years in accordance with the mandatory sentencing guidelines under NRS 200.366(3)(b). This appeal followed.

Bernal advances six arguments on appeal. First, Bernal contends there was insufficient evidence to sustain his conviction. Second, Bernal argues that the district court erred in not suppressing his confession and the contents of his interrogation. Third, Bernal contends the district court committed plain error when it failed to instruct the jury that it had to determine that Bernal's confession was voluntary before it could rely upon his confession for a conviction. Fourth, Bernal argues that the district court abused its discretion by overruling his objection to Detective Messman's testimony about his dream, as it was unfairly prejudicial and deprived him of a fair trial. Fifth, Bernal avers the district court violated his due process right to a fair trial by improperly limiting voir dire during jury selection. Sixth, Bernal argues that the mandatory sentence imposed under NRS 200.366(3)(b) constitutes cruel and unusual punishment. In response, the State argues that Bernal's statements made during his interview, including his confession, were voluntary and properly admitted into evidence, that there was substantial evidence to support the jury verdict, and that the district court did not commit any error necessitating reversal. We generally agree with the State and address each of Bernal's arguments on appeal in turn.

First, Bernal maintains that there was insufficient evidence to support the conviction as H.S.'s testimony was inconsistent, there was no

medical evidence to corroborate the alleged sexual assault, and H.S. "had revenge motivation to fabricate her testimony." In order to downplay his confession to the detectives, Bernal maintains that he told them what they wanted to hear so that he could get out of the room, and any admission of his involvement with H.S. that he made to Patricia was with sarcasm.[4]

In reviewing Bernal's challenge to the sufficiency of the evidence supporting his conviction, we must "consider 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." *Belcher v. State*, 136 Nev. 261, 275, 464 P.3d 1013, 1029 (2020) (internal quotation marks omitted). "[W]here there is conflicting testimony presented at a criminal trial, it is within the province of the jury to determine the weight and credibility of the testimony." *Deeds v. State*, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981).

Further, it has been established under Nevada law that "in sexual assault cases, . . . the victim's testimony alone is sufficient to uphold a conviction." *Rose v. State*, 123 Nev. 194, 203, 163 P.3d 408, 414 (2007). "However, the victim must testify with some particularity regarding the incident," such that the victim needs to provide more than just "speculation"

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[4]Bernal further argues that the insufficiency of the evidence is demonstrated in how the jury acquitted him on counts I and II and only found him guilty on count III. However, Bernal fails to provide this court with any relevant authority showing how the acquittal of the first and second counts demonstrates that the evidence at trial did not support a conviction on the third count. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (holding that this court need not address an appellant's argument if it is not supported with relevant authority). Further, the evidence was stronger as to count III. For example, Bernal's voluntary incriminating statement to the detectives was only directly related to count III.

or "mere conjecture." *LaPierre v. State*, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992) (emphasis omitted) ("We do not require that the victim specify exact numbers of incidents, but there must be some reliable indicia that the number of acts charged actually occurred.").

Here, there is sufficient evidence to support the jury's verdict. H.S. testified with the requisite particularity as required under *LaPierre*. At trial, H.S. was specifically asked about the frequency of the sexual assaults during the December 2018 to February 2019 date range, and she testified that it was happening on a regular basis (e.g., "[a]bout two times a week when it first started, and he escalated to five days a week, because my mom was home the other two"). H.S. was also able to vividly describe several incidents of unwanted digital penetration that occurred while she was in the ninth grade, including two incidents of digital penetration that occurred when she was in her bedroom and her mother was in the shower nearby.[5] In addition to H.S.'s testimony, Patricia testified that Bernal had admitted to her on July 14, 2019, that he touched H.S.'s vagina. Detective Messman also testified during trial regarding Bernal's confession, specifically describing how Bernal told him about an instance while he was massaging H.S.'s legs when "his hands had slipped" and his right index finger entered H.S.'s vagina. We will not second guess the jury's decision in weighing the credibility of each of these witnesses in reaching its verdict. *See Deeds*, 97 Nev. at 217, 626 P.2d at 272. Therefore, we conclude that the

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[5]We recognize that there is some uncertainty regarding the dates of these incidents. However, the evidence adequately suggested they occurred during the period covered by count III. Further, the Nevada Supreme Court has expressed understanding for the fact "that it is difficult for a child victim to recall exact instances when the abuse occurs repeatedly over a period of time." *LaPierre*, 108 Nev. at 531, 836 P.2d at 58.

State presented sufficient evidence to support the jury's verdict that Bernal was guilty of count III beyond a reasonable doubt.

Second, Bernal argues the district court erred in not suppressing incriminating statements he made to the detectives.[6] Bernal's primary argument on appeal is that any statements made to the detectives—and his confession regarding his digital penetration of H.S.'s vagina in particular—were involuntary. He argues that various factors caused his confession obtained during the interview process to be in violation of his constitutional rights. After considering the totality of the circumstances surrounding Bernal's interview, we disagree.

"[A] trial court's custody and voluntariness determinations present mixed questions of law and fact subject to [the appellate court's] de novo review." *Rosky v. State*, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005). "The district court's purely historical factual findings pertaining to the 'scene- and action-setting' circumstances surrounding an interrogation is entitled to deference and will be reviewed for clear error." *Id.* However, we review de novo "the district court's ultimate determination of whether a person was in custody and whether a statement was voluntary."[7] *Id.*

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[6]In reviewing the record, we note that Bernal never filed a motion to suppress but instead filed an opposition to the State's motion to admit. Nevertheless, we address Bernal's evidentiary challenge on the merits.

[7]The majority of the analysis provided by the district court in its order following the pretrial hearing related to the court's determination that Bernal was not in custody requiring *Miranda* warnings. A single phrase in the order stated that Bernal's confession was voluntary, as provided *supra*. We address the district court's factual findings regarding *Miranda* in our determination of whether Bernal's statements were voluntary as there is overlap between the two analyses.

As a preliminary matter, we note that despite Bernal arguing extensively in his opening brief that the statements he made to the detectives were made involuntarily, Bernal fails to provide any explicit authority or analysis contesting the district court's determination that he was not subjected to custodial interrogation for *Miranda* purposes. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). The analyses for determining whether a defendant has been placed in custody for purposes of requiring *Miranda* warnings and whether a confession was obtained voluntarily are legally distinct. *Rosky*, 121 Nev. at 193, 111 P.3d at 696 ("Unlike the objective custody analysis, the voluntariness analysis involves a subjective element as it logically depends on the accused's characteristics."). Because Bernal fails to conduct the appropriate analysis to support his claim of a *Miranda* violation,[8] we need not address the issue of whether Bernal was subjected to a custodial interrogation requiring him to be advised of *Miranda* warnings. Thus, we need not determine whether his confession was inadmissible under *Miranda*. Nevertheless, we note that the district court found that he was not under arrest and was free to leave the sheriff's substation when he made the incriminating statements.

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[8]For example, we note that Bernal fails to describe any of the factors required to be considered in determining whether he was "in custody" for *Miranda* purposes and fails to cite to any authority exploring those factors. *See Carroll v. State*, 132 Nev. 269, 282, 371 P.3d 1023, 1032 (2016) ("Custody is determined by the totality of the circumstances, including the site of the interrogation, whether the objective indicia of an arrest are present, and the length and form of questioning." (internal quotation marks omitted)).

We next consider whether Bernal's statements made during his noncustodial interview were voluntary and admissible or involuntary and inadmissible. The burden is on the prosecution to "prov[e] by a preponderance of the evidence that the statement was voluntary, *i.e.*, that the defendant's will was [not] overborne." *Id.* (second alteration in original) (footnote and internal quotation marks omitted); *see also Carroll v. State*, 132 Nev. 269, 280, 371 P.3d 1023, 1030 (2016) (holding that "[t]he question in each case is whether the defendant's will was overborne when he confessed" (alteration in original) (internal quotation marks omitted)). To determine whether the statements by a suspect were offered voluntarily, we consider the following factors: "[t]he youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep." *Rosky*, 121 Nev. at 193-194, 111 P.3d at 696 (alteration in original) (internal quotation marks omitted). We will also consider the "suspect's prior experience with law enforcement." *Id.* at 194, 111 P.3d at 696. Determining whether a confession is voluntary requires balancing the totality of the circumstances. *See Brust v. State*, 108 Nev. 872, 874, 839 P.2d 1300, 1301 (1992).

Under the totality of the circumstances, we are not persuaded that Bernal's will was overborne such that his statements during the interview process were made involuntarily and should not have been admitted. As a preliminary matter, there is no evidence in the record to suggest that Bernal was of low intelligence, and despite Bernal's argument that he was not educated in the law, Bernal cites to no authority indicating that not being educated in the law is a significant or determinative

voluntariness factor. Additionally, although Bernal's interview lasted for more than four hours, this alone does not render the statements he made involuntary. *See Rowbottom v. State*, 105 Nev. 472, 482, 779 P.2d 934, 940-41 (1989) ("Although the police interview with [appellant] was of longer duration than [five hours], nothing suggests to us that [appellant's] will was overborne as a result of the interview's length. Nor are we inclined to establish any set time limitation on police questioning. Instead, we believe that each situation should be evaluated according to its particular facts and circumstances."), *overruled on other grounds by Bigpond v. State*, 128 Nev. 108, 270 P.3d 1244 (2012).

Here, Bernal was offered apple pastries and water—which he accepted—and lunch. Bernal was able to take three to four breaks to use the restroom. He was also advised he could leave the interview at any time. We find Bernal's situation to be similar to another instance where the supreme court upheld the voluntariness of a defendant's statement even when the questioning lasted for four hours. *See Chambers v. State*, 113 Nev. 974, 980-81, 944 P.2d 805, 809 (1997) ("[Appellant] was not subject to any physical coercion or emotional overreaching, since he was given coffee, cigarettes, and the offer of food, and was able to articulate reasons why he wished to talk with the officers. He was treated politely by the officers, and the transcript of the interview reveals that no coercive interrogation techniques were employed.").[9]

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[9]We note that Bernal requested a cigarette break, which he was not given. However, the district court found that the detectives had not made an explicit denial of Bernal's request—they had never said "no" and never explicitly stated that he could not leave the interview to take a break. We see no clear error in this finding, and we note that the district court was able to review the recording of the exchange. We have not been provided

Further, when the district court determined Bernal was not in custody requiring *Miranda* warnings, it found that the atmosphere of the interview "was conversational and not dominated by police, [and] that no strong-arm tactic or deception [occurred] during the questioning." Such findings are also useful in determining whether Bernal's statements were made voluntarily. In reviewing the pretrial hearing transcript, we find no clear error in the district court's findings. *Rosky*, 121 Nev. at 190, 111 P.3d at 694. Detective Messman described the tone of the interview as being conversational. He also testified that at no point did Bernal refuse to answer the detective's questions or indicate that he would not answer additional questions.

We are also not persuaded that the detectives' techniques rose to the level of coercion found in *Passama v. State*. 103 Nev. 212, 215-16, 735 P.2d 321, 324 (1987) (holding that a confession was involuntary when the sheriff coerced the defendant by "suggest[ing] how the improper fondling had occurred until he secured the written confessions" and when there were threats to tell the prosecutor "to go all the way" if the defendant lied). We also note that Bernal's confession is similar to the defendant's confession in *Steese v. State*, 114 Nev. 479, 489, 960 P.2d 321, 328 (1998)—

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the recording for our review and, therefore, we presume that the recording would have supported the district court's determination. *Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997) (noting "[i]t is appellant's responsibility to make an adequate appellate record" and the appellate court "cannot properly consider matters not appearing in that record"); *Riggins v. State*, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991) (noting that because appellant bears the burden of providing an adequate record on appeal, "the missing portions of the record are presumed to support the district court's decision"), *rev'd on other grounds by Riggins v. Nevada*, 504 U.S. 127 (1992).

despite Bernal's confession containing some of the detective's questions related to accidental touching, Bernal "also mentioned a number of details of which the police had not informed him."

In summary, we agree with the district court's determination that Bernal's statements, including his confession, were made voluntarily. Thus, we conclude that the district court did not err in granting the State's motion to admit the evidence.

Third, Bernal argues that the jury should have been instructed that it was first required to determine that Bernal's statement to the detectives was voluntary and, if not, "then it could not use that statement for any purpose" in its deliberations. Bernal conflates his argument that this instruction was required to be given with his argument that he "was entitled to a jury instruction on his defense theory of the case" and that his "theory was that his statement to police was involuntary and constituted a false confession." As a preliminary matter, Bernal did in fact request an instruction related to his defense theory indicated above and Bernal's proposed instruction was in fact given to the jury.[10] However, Bernal did not request an instruction on voluntariness. Thus, we will consider whether it was plain error for the district court not to separately instruct the jury that it had to first determine whether Bernal's statements during his interview were voluntary before it could consider them during deliberations. *See Romero v. State*, No. 67731, 2016 WL 3257826, at *1 (Nev. June 10, 2016) (Order of Affirmance) (providing that when a defendant fails to object

[10]Jury instruction number 14 reads as follows: "Mr. Bernal's theory of the defense is that [H.S.] falsified the allegations in this case to remove him from her life because he was the primary disciplinarian in the home and law enforcement coerced Mr. Bernal into providing a false confession."

to jury instructions being challenged on appeal, the appellate court reviews "the[ ] arguments for plain error" (citing *Saletta v. State*, 127 Nev. 416, 421, 254 P.3d 111, 114 (2011))).

"In conducting plain error review, [the appellate court] must examine whether there was error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights." *Saletta*, 127 Nev. at 421, 254 P.3d at 114. To constitute plain error, "the error must be clear under current law." *Id.* (internal quotation marks omitted). "[T]he burden is on the defendant to show actual prejudice or a miscarriage of justice." *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

Here, Bernal never requested an instruction on voluntariness below, and he has failed to provide any authority to support that the district court must sua sponte instruct a jury. Further, Bernal fails to cite in his briefing to Nevada's controlling cases that discuss the jury's role in voluntariness determinations. *See Laursen v. State*, 97 Nev. 568, 570, 634 P.2d 1230, 1231 (1981) ("Under [the Massachusetts Rule,] the trial judge receives evidence on the voluntariness of the statement and determines whether the statement was voluntary. If so, it is admitted. However, the court must later submit the issue by appropriate instruction to the jury."); *Carlson v. State*, 84 Nev. 534, 536, 445 P.2d 157, 159 (1968) (adopting the Massachusetts Rule). Importantly, these cases provide no explicit instruction on whether the district court has a duty, sua sponte, to deliver such an instruction to the jury absent a request by counsel. Further, the Nevada Supreme Court has provided that "[t]here is no constitutional mandate that voluntariness of such statements be determined by both judge and jury." *Laursen*, 97 Nev. at 570, 634 P.2d at 1231. Thus, we conclude that Bernal has not shown plain error because he cites no legal authority

under Nevada law requiring the district court to sua sponte instruct the jury to also consider the voluntariness of a statement nor has he shown prejudice in that it adversely affected his substantial rights. *See Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018) (discussing plain error review and its three-part test).

Fourth, Bernal claims that the district court abused its discretion by overruling his objection to the admission of evidence that he had "a dream that he had a baby with H.S." because it was a "highly prejudicial statement." Bernal argues that admission of this testimony constituted impermissible bad act evidence which should have been excluded.

"We review a district court's decision to admit or exclude evidence for an abuse of discretion." *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). "Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence . . . ." *Chavez v. State*, 125 Nev. 328, 344, 213 P.3d 476, 487 (2009) (internal quotation marks omitted). Under NRS 48.035(1), even if evidence is relevant, "evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury."

Although Bernal provides authority concerning prior bad acts, he fails to show how a dream constitutes a prior bad act for purposes of NRS 48.045(2), which prohibits "[e]vidence of other crimes, wrongs or acts . . . to prove the character of a person in order to show that the person acted in conformity therewith." Further, the district court did not actually classify the dream as a prior bad act, but rather found the dream was admissible

because Bernal's attraction to H.S. was "relevant to him sexually abusing her." Regardless, as previously noted, under the evidentiary standard and the bad act rules, even when evidence is relevant, the court is required to determine if the probative value is substantially outweighed by the prejudicial effect. *See, e.g., Randolph v. State*, 136 Nev. 659, 665, 477 P.3d 342, 348-49 (2020) (discussing prior bad act evidence and the balancing of probative value and unfair prejudice); *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 933-34, 267 P.3d 777, 781 (2011) (discussing unfair prejudice). Here, the district court also determined that the dream's probative value outweighed its prejudicial effect.

Without deciding whether Detective Messman's testimony regarding Bernal's dream was admissible, we conclude that even if the district court abused its discretion by admitting such evidence, the error was harmless as there was overwhelming evidence to support his conviction beyond a reasonable doubt, including H.S.'s testimony, Patricia's testimony as to Bernal's confession, and Detective Messman's testimony as to Bernal's voluntary confession during his interview. *See Estes v. State*, 122 Nev. 1123, 1141, 146 P.3d 1114, 1126 (2006) ("While the probative value of the evidence seems marginal and is unrelated to the elements of any of the charges, the introduction was harmless beyond a reasonable doubt, given the overwhelming evidence presented by the State against Estes."), *overruled on other grounds by Pundyk v. State*, 136 Nev. 373, 467 P.3d 605 (2020).

Fifth, Bernal argues that he "was deprived of the ability to remove potential jurors for cause because of the District Court's Order precluding extensive juror voir dire." Further, Bernal contends that "[t]here were jurors who were not challenged for cause even though they were prior victims of sexual assault."

As Bernal failed to object to the voir dire process below, we review for plain error. "The court shall conduct the initial examination of prospective jurors, and defendant or the defendant's attorney and the district attorney are entitled to supplement the examination by such further inquiry as the court deems proper. Any supplemental examination must not be unreasonably restricted." NRS 175.031. "Voir dire serves to determine whether jurors can and will, in accordance with their oath, render to the defendant and the state a fair and impartial trial on the facts allowed to be presented to them by the court." *Chaparro v. State*, 137 Nev., Adv. Op. 68, 497 P.3d 1187, 1193 (2021) (internal quotation marks omitted). The Nevada Supreme Court has provided that "[b]oth the scope of voir dire and the method by which voir dire is pursued are within the discretion of the district court." *Salazar v. State*, 107 Nev. 982, 985, 823 P.2d 273, 274 (1991) (alteration in original) (internal citations and quotation marks omitted); *see also Whitlock v. Salmon*, 104 Nev. 24, 28, 752 P.2d 210, 213 (1988) (noting it is "the absolute right of a trial judge to reasonably control and limit an attorney's participation in voir dire").

Based on the record, we cannot determine that voir dire was improperly conducted. Bernal fails to provide us with the order that he now objects to on appeal, without which it is very difficult for us to make a determination that the district court unreasonably restricted counsel's voir dire. Further, based on the transcript of the voir dire proceedings, the district court and counsel for both parties engaged in extensive questioning of the venire. During voir dire, the court specifically asked the venire, among other questions related to their ability to be impartial, whether any of the prospective jurors had "been either a victim or know a victim or have been a witness . . . to a sexual assault?" The district court excused

prospective jurors who raised concerns having been victims of sexual assault, either as the result of for cause challenges or peremptory challenges. Bernal has not identified—nor has our review of the record revealed—any juror who was left on the venire and who was potentially biased based on the juror's experience with circumstances similar to those presented in this case. Thus, Bernal has failed to show that any error, plain or otherwise, occurred during the voir dire process, or that it affected his substantial rights.[11] *See Jeremias*, 134 Nev. at 50, 412 P.3d at 48 (discussing plain error review).

Sixth, Bernal argues that his mandatory sentence under NRS 200.366(3)(b) constitutes cruel and unusual punishment under the Eighth Amendment. Further, he contends that "200.366(3)(b) provides no hope for rehabilitation" and the punishment is extreme. Also, Bernal contends that given the fact that the district court cannot "weigh the facts of [his] case against others that it has seen," the statute violates "his right to due process and a fair sentencing hearing." Finally, Bernal argues that his sentence cannot withstand constitutional review because of his lack of criminal history, his age, "his lack of life experience and the jury's acquittal of two of three counts." We are not persuaded.

The Nevada Supreme Court has stated that "[o]rdinarily, a sentence of imprisonment that is within the statutory limits is not considered cruel and unusual punishment." *Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). Further, "[s]ubstantial deference must be

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[11]Voir dire is not unreasonably restricted merely because the district court made a few offhand comments about not wanting to waste anyone's time due to COVID-19 concerns, or because of an isolated, single incident where the district court advised the State to get to the point during a bench conference.

accorded legislatures and sentencing courts when a reviewing court conducts a proportionality analysis of a sentence." *Id.*

"A sentence does not constitute 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." *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979).[12] Both the Nevada Supreme Court and this court have declined to conclude that NRS 200.366(3)(b) is unconstitutional based on the statute imposing cruel and unusual punishment. *See, e.g., Flores-Martinez v. State*, No. 79974, 2020 WL 6938804, at *2 (Nev. Nov. 24, 2020) (Order of Affirmance).[13] In *Flores-Martinez*, the Nevada Supreme Court did not find persuasive many

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[12]We note that

> a punishment is excessive and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground.

Pickard v. State, 94 Nev. 681, 684-85, 585 P.2d 1342, 1344 (1978) (internal quotation marks omitted).

[13]Other examples are available, though these cases are not binding on this court. *Jefferson v. State*, No. 62120, 2014 WL 3764809, at *6-7 (Nev. July 29, 2014) (Order of Affirmance); *Tom v. State*, No. 80719-COA, 2021 WL 631573, at *6 (Nev. Ct. App. Feb. 17, 2021) (Order of Affirmance) ("There is no precedent in Nevada that supports [appellant's] argument that his sentence is disproportionate to digital penetration simply because this is his first sexual assault conviction or that digital penetration is less severe than sexual intercourse. We also emphasize that the Legislature specifically passed legislation that makes no distinction between sexual assault based on digital penetration versus intercourse.").

of the similar concerns raised by Bernal in his appeal. *See id.* (noting that "rehabilitation is not the only acceptable goal of punishment").

We conclude that Bernal's sentence does not constitute cruel and unusual punishment. We do not find his arguments regarding his lack of criminal history, age, or lack of life experience sufficient to show that his sentence shocks the conscience, especially considering the fact that he abused his position as the victim's stepfather and sexual abuse can have lifelong adverse effects.[14] Bernal's sentence is within NRS 200.366(3)(b)'s parameters. Bernal fails to demonstrate that this sentence is grossly out of proportion in light of his conduct of having digitally penetrated[15] H.S.'s vagina against her will, potentially two to five times a week according to H.S.'s testimony. Finally, Bernal fails to provide any Nevada authority to

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[14]The consequences of child sexual abuse, such as depression and posttraumatic stress disorder, have been documented elsewhere. *See, e.g.*, *Fast Facts: Preventing Child Sexual Abuse*, CDC (April 6, 2022), https://www.cdc.gov/violenceprevention/childsexualabuse/fastfact.html (listing the "short- and long-term physical, mental, and behavioral health consequences" experienced by child victims of sexual abuse and documenting additional scholarly articles on the matter). Additionally, we note that at the sentencing hearing, letters from H.S. and her biological father were submitted to the court. Those letters are not included in the record, but the transcript from the hearing reveals that in those letters H.S. described experiencing trauma and that she had indicated being unhappy and having difficulty trusting others.

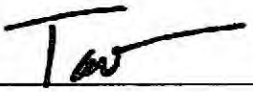
[15]The Legislature has broadly defined sexual penetration, and without authority suggesting otherwise, we accord the Legislature substantial deference. NRS 200.364(9) defines "sexual penetration," which is used in NRS 200.366(3)(b), as "cunnilingus, fellatio, or any intrusion, *however slight*, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including sexual intercourse in its ordinary meaning." (Emphasis added.)

support his argument that his sentence is excessive or grossly out of proportion to the severity of the crime.

For the foregoing reasons, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. John Schlegelmilch, District Judge
Karla K. Butko
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Lyon County District Attorney
Third District Court Clerk